83-1382

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN M. GERAGHTY, individually and on behalf of a class, Petitioners.

-vs-

UNITED STATES PAROLE COMMISSION and ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Are the policies implemented in the federal "guidelines for parole release decisionmaking," 28 C.F.R. §2.20, i.e.,

-- that the actual length of a prisoner's sentence should not be weighed in the parole release decision, and

-- that only a minor role is to be afforded to rehabilitation,

contrary to the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233?

2. Assuming that the parole guidelines are consistent with the PCRA, may Congress, consistent with Article III of the Constitution of the United States, delegate to an administrative agency the power to resentence convicted felons, and, if so, does the PCRA contain sufficient standards for such a delegation?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
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UNITED STATES PAROLE COMMISSION and ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 6, 1983.

OPINIONS BELOW

The opinion of the court of appeals (App. A1-A30) and the dissenting opinion from the denial of rehearing en banc (App.

C2-C3) are reported at 719 F.2d 1199. The opinion of the district court (App. B1-B69) is reported at 552 F.Supp. 276.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a). The judgment of the court of appeals was entered on October 6, 1983 (App. D1); a timely petition for rehearing was denied on October 28, 1983. (App. C1-C2.)

STATUTES AND REGULATIONS INVOLVED

This case involves 18 U.S.C. §§4203(a), 4205, 4206(a), 4207, and 28 C.F.R. §2.20, the pertinent portions of which are reproduced in Appendix E.

STATEMENT

-I-

At issue in this case is whether the policies implemented in the federal parole guidelines, 28 C.F.R. §2.20, were intended by Congress when it enacted the Parole

Commission and Reorganization Act of 1976, Pub.L. 94-233, and, if so, whether the statute is constitutional.

When this case was first before this Court, the Commission conceded that the initial decision of the court of appeals (579 F.2d 238) "effectively determines the issue of the validity of the Guidelines." (United States Parole Commission v. Geraghty, No. 78-572, O.T. 1977, Pet.Br. 23.)

In its first decision in this case, the Court "defer[red] decision on the merits . . . until after it is determined affirmatively that a class properly can be certified." United States Parole Commission v. Geraghty, 445 U.S. 388, 408 (1980).

On remand, the district court ordered that the case proceed as a class action and, following a trial, upheld the legality of the guidelines. (App. B1-B69.)

The court of appeals affirmed (App. A1-A30), concluding that the Court's decision in United States v. Addonizio, 442 U.S. 178 (1979) had overruled its initial decision in this case. (App. A20-A23.) Rehearing was denied over the dissent of Judge Adams, the author of the Third Circuit's first decision in this case. (App. C2-C3.)

-II-

In 1973, the federal parole board adopted explicit parole release criteria -- the parole "guidelines" -- for adult prisoners.[1] A new parole statute (the PCRA) was enacted in 1976; the then existing guidelines were adopted under the PCRA by the newly created United States Parole Commission.

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[1] The guidelines consist of two scales which determine the range of "customary total time" an prisoner must ordinarily serve before being granted parole. Parole is granted in less than one case out of ten before a prisoner has served the "customary total time."

Under the guidelines, the actual sentence imposed by the district judge is not relevant to whether and when a prisoner will be released on parole. (App. 35)[2] In addition, as the district court found, rehabilitation has "little impact on the parole decision." (App. B47.)

The parole release decision under the guidelines consists of determining a prisoner's "offense severity rating"[3]

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[2] The length and type of sentence, of course, determines whether and when the prisoner will become eligible for release on parole.

[3] The "offense severity scale" of the guidelines (App. E5-E18) contains eight classifications of offenses, ranging from "Category 1" (lowest severity) to "Category 8" (highest severity." The district court found that offenses are categorized in this scheme "without regard to the maximum-minimum penalties set by Congress." (App. B35.)

For each "offense severity category," the "offense severity scale" lists four ranges of "customary total time" which must ordinarily be served before parole will be granted. (App. E18.) The district court found that "[t]he customary total time has no relationship to the sentence actually imposed on the inmate." (App. B28.)

and "salient factor score,"[4] and consulting the guideline table to determine the "customary length of imprisonment." A decision to grant parole before the prisoner has served this "customary length of imprisonment" is made in less than ten percent of all cases, including those cases in which the actual sentence imposed is less than the "customary length of imprisonment" of the guidelines.

-IV-

The guidelines are based upon a study of parole release decisionmaking in Youth

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[4] The "salient factor scale" (App. E19) determines which of the four ranges of "customary total time" will be applied to a particular prisoner. A "very good" salient salient factor score corresponds to the lowest range of customary total time" for a particular offense severity rating.

A prisoner's "salient factor score" cannot be changed during incarceration, and is based upon the number of prior convictions, number of prior commitments, age at current offense, the length of recent commitment free period, history as a probation or parole violator, and whether or not the prisoner has had an opiate dependence.

Correction Act cases (App. B28-B30, cases in which there is not a judicially set length of sentence. 18 U.S.C. §5017(a).

The Youth Act study, which was predicated on the belief that parole release is "a deferred sentencing decision," revealed that the primary factor in parole release decisibns was a judgment of the severity of the prisoner's offense. (App. B28-29.)

The parole board, without undertaking any similar study of actual decisionmaking in adult cases, decided to employ its YCA policy as a model for adult cases. (App. B29.) The result of this policy decision is the present type of guidelines which do not weigh the actual length of sentence.

-V-

Throughout this litigation, plaintiff has contended inter alia that Congress did not authorize the Parole Commission to re-

fuse to consider the actual length of a prisoner's sentence and that any such authorization would encroach upon the independent judiciary guaranteed by Article III.

In rejecting this argument, the court of appeals concluded that this Court's decision in United States v. Addonizio, 442 U.S. 178 (1978) had upheld the Parole Commission's power to disregard the actual length of a prisoner's sentence in making parole release decisions. (App. A20-23.)

REASONS FOR GRANTING THE WRIT

The legality of the federal parole guidelines, 28 C.F.R. §2.20, is an important question which has not been decided by this Court. Certiorari should be granted to resolve the doubts about the legality of the guidelines expressed in the Third Circuit's first opinion in this case, 579 F.2d 238.

1. The lower federal courts which have considered the legality of the guidelines are in agreement that the focus of the parole release decision under the guidelines is vastly different from the traditional concern with the "conduct of penitentiary convicts during their incarceration." United States v. Murray, 275 U.S. 347, 359 (1927).[5]

In lieu of the "predictive judgment" as to when "the inmate is prepared to adjust to parole release," Greenholtz v. Inmates, 442 U.S. 1, 8, 15 (1979), the guidelines substitute the Parole Commission's independent determination as to the "customary length of imprisonment" which a prisoner should serve. The actual sentence imposed is irrelevant to the "customary length of

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[5] See, e.g., Priore v. Nelson, 626 F.2d 211, 216-17 (2d Cir. 1980); Garcia v. Neagle, 660 F.2d 983, 991 (4th Cir. 1981); Young v. United States Parole Commission, 682 F.2d 1105 (5th Cir. 1982).

imprisonment," which may exceed the actual sentence being served, in which case parole will ordinarily be denied.

2. In upholding the guidelines in this case, the court of appeals concluded that the policies implemented in guidelines, while not specifically authorized in the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233, are not plainly inconsistent with the statute. (App. A13-A18.)

A different standard -- that of "substantial support in the legislative history," Ernst & Ernst v. Hochfelder, 425 U.S. 185, 211 (1975) -- has been applied by this Court in other contexts. See, e.g., Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972) ("clear and certain signal from Congress" required to expand patent rights); Cole v. Young, 351 U.S. 536, 546-47 (1956) (summary dis-

missal of governmental employees); SEC v. Sloan, 436 U.S. 103, 112 (1978) ("clear mandate from Congress" to authorize successive summary suspensions of trading in securities); Bread Political Action Committee v. Federal Election Committee, 102 S.Ct. 1235, 1239-40 (1982).

3. Neither the express language of the PCRA nor its legislative history expressly authorize the Parole Commission to make parole release decisions without regard to the actual sentence imposed. That Congress was unaware of any such provision in the PCRA is shown by its subsequent observation that

> A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years knowing that the offender is eligible for parole release after one third of the sentence. S.Rep. 95-605, 95th Cong., 1st Sess. 1169 (1976).

4. That the PCRA requires parole release decisions to be made pursuant to

guidelines, 18 U.S.C. §4206, does not mandate the type of guidelines used by the Parole Commission. In contrast to the "matrix model" used by the Commission, a "sequential model" has been adopted by parole board in jurisdictions which recognized that "it was not their responsibility, in effect, to resentence the inmate." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, Classification for Parole Decision Policy 38 (1978).

The "sequential model" of parole guidelines has been employed in jurisdictions "where the inmate must serve a fixed proportion of his/her maximum sentence." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, supra, at 29. Those jurisdictions which, like the Parole Commission, have opted for a "matrix model" have done so on the view that "the parole decision is a deferred sentencing decision." Id. at 28.

5. Neither the express statutory language of the PCRA nor its legislative history provide any support for the view that Congress intended the Parole Commission to make deferred sentencing decisions, as it does under its present guidelines. Any such Congressional intent would raise substantial questions about the standardless delegation, see Industrial Union v. American Petroleum Institute, 448 U.S. 607, 685-86 (Rehnquist, J., concurring), of Article III sentencing power to an administrative agency. Cf. Hill v. United States, 298 U.S. 460, 464 (1936) (sentencing "is part of the judicial function")

The court of appeals concluded that this Court had resolved the Article III question in its decision in United States v. Addonizio, 442 U.S. 178 (1978) (App. 21-23.) But as Judge Adams stated in his opinion dissenting from the denial of re-

hearing en banc, Addonizio expressly reserved decision on the legality of the parole guidelines. (App. C2-C3.)

The question of whether the PCRA lawfully transformed parole into a deferred sentencing decision, to be made without regard to rehabilitative factors, is an important question which should be resolved by this Court.

CONCLUSION

It is therefore respectfully submitted that certiorari be granted.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3593

GERAGHTY, JOHN M., individually and on behalf of a class

ADDITIONAL PLAINTIFFS:
VILLANTI, FRANK
FORD, NICOLA

vs.

UNITED STATES PAROLE COMMISSION and ATTORNEY GENERAL OF UNITED STATES and SUPERINTENDENT, FEDERAL PRISON CAMP Montgomery, Pa.

John M. Geraghty,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 76-1467)

Argued
August 11, 1983

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, *Chief Judge*.*

(Filed October 6, 1983)

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*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

This appeal presents three questions: whether the district court properly made certain class certification decisions; whether the federal parole guidelines violate the Parole Commission and Reorganization Act of 1976

(PCRA); and if not, whether construing the PCRA to authorize the guidelines renders the statute unconstitutional. The district court, following a remand from the United States Supreme Court, certified a plaintiff class consisting of federal prisoners in the Middle District of Pennsylvania, and, after a bench trial, held both that the guidelines were valid under the PCRA and that interpreting the PCRA to authorize the guidelines did not offend the Constitution. Geraghty, for himself and the class, appeals both the district court's class action determination and its decision on the merits. We affirm.

I.

On September 15, 1976, plaintiff John M. Geraghty, a federal prisoner, initiated this class action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief[1] after his requests for release on parole had been twice denied.[2] He challenged the legality of the federal parole

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1. Geraghty was serving a 30-month sentence for conspiracy to commit extortion and making false material declarations to a grand jury. When he was originally sentenced, he was given concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The sentencing court later commuted his sentence to 30 months pursuant to Rule 35, F.R.Crim.P. *United States v. Braasch*, No. 72-979 (N.D. Ill. Oct. 9, 1975), *appeal dismissed and petition for mandamus denied*, 542 F.2d 442 (7th Cir. 1976). In reducing his sentence, the court reasoned that the application of the parole guidelines would cause Geraghty to be imprisoned substantially longer than it originally intended.

2. After four months in custody, Geraghty applied for release on parole. His first application was denied with the following explanation:

> Your offense has been rated as very high severity. You have a [parole prognosis] score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36

guidelines, both on their face and as applied, and the constitutionality of the PCRA. The district court construed the case as one sounding in habeas corpus and transferred it to the Middle District of Pennsylvania, the situs of Geraghty's incarceration. The transferee district court agreed that it was a habeas corpus proceeding, denied class certification, and granted summary judgment in favor of the defendants both as to the legality of the parole guidelines and the constitutionality of the statute under which they had been promulgated. *Geraghty v. United States Parole Commission*, 429 F. Supp. 737 (M.D. Pa. 1977). Geraghty appealed, but before disposition, his sentence expired and he was released.

We subsequently reversed and remanded, *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), holding: (1) the case should have been construed as an action for declaratory judgment rather than habeas corpus; (2) Geraghty's release did not render the appeal moot; and (3) the district court erred in failing to consider *sua sponte* the possibility of creating subclasses when it denied class certification. Then, to avoid "improvidently dissipat[ing] judicial effort," *id.* at 254, we went on to address the merits of Geraghty's substantive claims for the limited purpose of determining whether a trial should be had. We concluded that it should, stating:

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months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted.

Geraghty reapplied for parole several months later, and again, his application was denied for the same reason. Thus, as the guidelines were applied, Geraghty was required to stay in prison, unparoled, until the expiration of his sentence, minus good-time credits.

> If Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence, there are important divergents between the Parole Commission's actions and the intent of Congress in enacting the statutory mandate.

Id. at 259.

The Commission petitioned the Supreme Court for certiorari, which was granted. *United States Parole Commission v. Geraghty*, 440 U.S. 945 (1979). The Court then vacated our decision and remanded the case for further proceedings. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). It agreed that Geraghty's release from custody had not mooted the case, but rejected our suggestion that the district court should have considered *sua sponte* the possibility of creating subclasses when it denied class certification. It ruled that the burden of constructing subclasses should be on Geraghty rather than the district court. Finally, the Court declined to address the merits, stating:

> although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

Id. at 408.

On remand, rather than certify the nationwide class suggested by Geraghty, the district court allowed the case to proceed as a class action consisting only of federal prisoners confined in the Middle District of Pennsylvania who are, or will become, eligible for parole

release under 18 U.S.C. § 4205(a)[3] and who have been, or will be, denied parole and continued to the expiration of their sentences. It limited the case to a consideration of two issues advanced by Geraghty: the legality of the parole guidelines under the PCRA and the facial constitutionality of the statute. *Geraghty v. United States Parole Commission*, No. 76-1467 (M.D. Pa. Dec. 10, 1980), *reprinted in* app. at 27. In so doing, it refused to consider whether the Commission's failure to distinguish between 18 U.S.C. §§ 4205(a) and 4205(b)[4] offenses was permissible, whether the parole guidelines were unlawful as applied, and whether applying the parole guidelines retroactively constitutes a violation of the *ex post facto* clause of the Constitution (an issue since addressed by this court in *United States ex rel. Forman v. McCall*, No. 82-3021 (3d Cir. filed June 10, 1983)). After a bench trial, the district court again upheld both the legality of the parole guidelines under the

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3. Section 4205(a) provides:

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

4. Section 4205(b) provides:

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

PCRA and the constitutionality of the statute. *Geraghty v. United States Parole Commission*, 552 F. Supp. 276 (M.D. Pa. 1982). Geraghty again appeals, contending that both the district court's class action determination and its decision on the merits were erroneous.

II.

Geraghty attacks the district court's class action determinations on three grounds, arguing that the court erred in: (1) certifying a class limited to prisoners confined in the Middle District of Pennsylvania; (2) refusing to certify the class on the question of the propriety of applying the same guidelines both to prisoners sentenced under 18 U.S.C. § 4205(a) and to those sentenced under 18 U.S.C. § 4205(b); and (3) refusing to certify the class on the question of the legality of parole guidelines as applied. Going to the merits, appellant's primary contention is that the parole guidelines offend the PCRA because they do not specifically require the Commission to consider either the prisoner's rehabilitation and institutional behavior or the length of his sentence. Presuming the guidelines are adjudged to be valid, however, he argues that such a construction of the PCRA renders it unconstitutional as an impermissible infringement of judicial and legislative functions. Although we will consider these arguments *seriatim*, a short description of the PCRA and the guidelines will place the contentions in proper perspective.

III.

A.

In 1976, Congress enacted the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218. The statute created the United States Parole Commission as successor to the United States Board of Parole, 18 U.S.C. § 4292, and empowered it to make parole release

decisions for eligible federal prisoners. 18 U.S.C. § 4203(b). The PCRA also made it the Commission's responsibility to promulgate guidelines to govern the exercise of that power. 18 U.S.C. § 4203(a)(1).

In making a parole release decision under the statute, the Commission first must find that the prisoner is eligible for release. Eligibility is controlled by the nature of the sentence imposed by the sentencing judge. If the sentencing judge imposes a definite term sentence, according to 18 U.S.C. § 4205(a), the prisoner is usually ineligible for release on parole until after he has served one-third of his sentence. If the sentencing judge fixes a minimum term of incarceration, 18 U.S.C. § 4205(b)(1) governs, and the prisoner becomes eligible for parole at the expiration of that term. But if the judge fixes a maximum sentence to be served, he may grant the Commission carte blanche authority to release the prisoner at any time under 18 U.S.C. § 4205(b)(2).

Presuming the prisoner is eligible for parole release, the PCRA directs the Commission to determine whether that release should be granted. Specifically, 18 U.S.C. § 4206(a) dictates that a prisoner is to be released pursuant to the Commission's guidelines, if

> [he] has substantially observed the rules of the institution . . . to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare.

Only for good cause may the Commission depart from the guidelines in granting or denying a prisoner release on parole. 18 U.S.C. § 4206(c).

In making its many parole release determinations, the Commission must consider, if available and relevant:

> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
>
> (3) presentence investigation reports;
>
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and
>
> (5) reports of physical, mental, or psychiatric examination of the offender.

18 U.S.C. § 4207. All additional relevant information concerning the prisoner that is reasonably available must also be considered. *Id.*

B.

"To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration," 28 C.F.R. § 2.20(a) (1981), the Commission promulgated guidelines for making parole release determinations pursuant to 18 U.S.C. § 4203(a)(1). *See* Amendment to Paroling Policy Guidelines, 47 Fed. Reg. 56, 336 (1982) (to be codified at 28 C.F.R. § 2.20). The guidelines were substantively similar to the ones that channeled the discretion of the Board of Parole before the enactment of the PCRA. Embodied in these guidelines is a formula that enables the Commission to compute the "customary total time" an eligible federal prisoner must serve before being re-

leased on parole. To make this computation, the Commission first must determine the severity of the prisoner's offense—a determination that is made without regard to the maximum-minimum offense penalties set by Congress or sentence length. The Commission then must assess the likelihood that the prisoner will succeed on parole—an assessment that is not based on a prisoner's rehabilitative progress, but on the number of prior convictions, number of prior commitments, age at current offense, length of recent commitment free period, current probation or parole status, and history of heroin or opiate dependence. Although prisoners are ordinarily released or detained in accordance with these guidelines, "[w]here the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered." 28 C.F.R. § 2.20(c) (1981).

IV.

Reaching Geraghty's contentions, we first must decide whether the district court erred in its class action determinations. We must uphold those determinations absent proof of abuse of discretion. *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 822 (3d Cir. 1982). We find no abuse of discretion here.

First, the district court did not abuse its discretion in refusing to certify a nationwide class of federal prisoners. The lower court based its decision to confine the class to those imprisoned in the Middle District of Pennsylvania on the policy of preserving inter-circuit comity. *See Bijeol v. Benson*, 513 F.2d 965, 968 (7th Cir. 1975). It is within the district court's discretion to conclude that classwide consideration of the legality of the parole guidelines and the constitutionality of the PCRA might interfere with the litigation of similar issues in other judicial districts. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Next, the district court did not abuse its discretion in refusing to certify the class on the question of the propriety of guidelines that allow the Commission to treat prisoners sentenced under 18 U.S.C. § 4205(a) the same as those sentenced under 18 U.S.C. § 4205(b). The lower court based this decision on the "negotiated give-and-take" of counsel at the pre-trial conference.[5] It reasoned that because the parties agreed at the conference to abandon the proposed subclass of prisoners sentenced under 18 U.S.C. § 4205(b) and because no objection was raised to certifying the subclass of prisoners sentenced under 18 U.S.C. § 4205(a), its decision to certify only the latter subclass was proper. Having certified

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5. The district court explained:

> At the conference we held on July 2, 1980, counsel for Plaintiff and Defendants presented their arguments for and against the proposed subclasses. Plaintiff's counsel agreed to drop Subclass II [prisoners sentenced under § 4205(b)(1) and (b)(2)] and Subclass I(b) [prisoners sentenced under § 4205(a) who have been granted a presumptive release date which requires them to serve one-third of their sentence in prison] and Defendants' counsel could present no opposition to a certification of Subclass I(a) [prisoners sentenced under § 4205(a) who have been, or will be, denied parole and continued to the expiration of their sentence]. In the report filed on July 17, 1980, Defendants still focused no objections on the certification of Subclass I(a). We conclude, therefore, that Defendant has presented no opposition to Subclass I(a). In his response to Defendants' report, filed on July 25, 1980, Plaintiff's counsel suggests a new Subclass I for our consideration. We will base our decision on what class to certify, however, on the negotiated give-and-take of counsel at the conference. The elimination of Subclasses I(b) and II negates Defendants' arguments about adverse interests within the class. The § 4205(b) application issue is therefore dropped because subclass I(a), the class we certify herein, includes no federal prisoners sentenced thereunder.

Geraghty v. United States Parole Commission, No. 76-1467, slip op. at 4 n.4 (M.D. Pa. Dec. 10, 1980), *reprinted in* app. at 27.

that limited subclass, the district court concluded that it would be improper to allow that subclass to litigate an issue that implicated the interests of the non-certified subclass as well. As the parties have not provided us with any documentation of the pre-trial negotiations to assist us in our review of the district court's disposition of this issue below, deference to that court's exercise of discretion is appropriate. Moreover, in the view we take on the substantive merits of this case, any abuse of discretion relating to the disposition of this class action determination, or the one concerning certification of a nationwide class, would be harmless.

Finally, the district court did not abuse its discretion in refusing to certify the class on the question of the legality of the parole guidelines as applied. The district court reasoned that:

> The growing number of prisoner cases in which federal courts have specifically found that the potential parolee has received individualized application of the guidelines clearly reflects the varying issues of fact that emerge in the application issue. *See, e.g., United States ex rel. Goldberg v. Warden*, 622 F.2d 60, 65 (3d Cir. 1980); *Priore v. Nelson*, 626 F.2d 211, 216 (2d Cir. 1980). The factual questions inherent in making a parole decision under the guidelines involve too many individual case variations to be the proper subject of a class action. *Locicero v. Day*, 518 F.2d 783, 785 (6th Cir. 1975).

Id., slip op. at 8 (footnote omitted). In addition, although this class action was brought under Rule 23 (b)(2), F.R.Civ.P., rather than under Rule 23 (b)(3), F.R.Civ.P.,[6] thereby suggesting that individual case

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6. Rule 23 provides in relevant part:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .

variation should not bar classwide treatment of the application issue, we have previously committed to the district court the discretion to deny certification in Rule 23 (b)(2) cases in the presence of "disparate factual circumstances." *Carter v. Butz*, 479 F.2d 1084, 1089 (3d Cir.), *cert. denied*, 414 U.S. 1094 (1973). We will thus defer to the discretion exercised here by the district court. We now turn to the two substantive issues raised by appellant — the validity of the guidelines under the PCRA and the constitutionality of the statute.

VI.

We first address appellant's contention that the guidelines violate the PCRA because they do not specifically require the Commission to consider (1) a prisoner's rehabilitation and institutional performance or (2) the length of his sentence.

A.

In addressing appellant's institutional rehabilitation argument, we look first to the language of the statute. There is no doubt that the PCRA requires the Commission to consider rehabilitation and institutional behavior in its parole decisionmaking process. Specifically, the preamble to 18 U.S.C. § 4206(a) makes satisfactory institutional conduct a prerequisite to granting release on parole. If the Commission deter-

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

. . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . .

mines that a prisoner's conduct record is poor, it need not inquire further; parole will be denied. In this way, the statute sanctions the use of institutional performance as a negative factor. If the Commission determines that a prisoner has shown good institutional conduct, however, it must then go on to consider both the nature and circumstances of the offense and the history and characteristics of the prisoner to determine whether parole release should be granted. 18 U.S.C. § 4206(a). As part of this inquiry, 18 U.S.C. § 4207 directs the Commission to consider, *inter alia*, "reports and recommendations which the staff of the facility in which such prisoner is confined may make." Reading 18 U.S.C. §§ 4206 and 4207 together, therefore, suggests that both positive and negative institutional behavior are part of the "history and characteristics of a prisoner" that must be reviewed by the Commission. Thus, as we read the statute, institutional behavior, while certainly not the primary factor to be considered in determining whether to grant parole, must be given some consideration in the parole decisionmaking process. *See Hayward v. United States Parole Commission*, 659 F.2d 857, 861 (8th Cir. 1981); *Moore v. Nelson*, 611 F.2d 434, 438 (2d Cir. 1979); *Shahid v. Crawford*, 599 F.2d 666, 670 (5th Cir. 1979).

We find the guidelines to be consistent with this stated statutory directive. First, the guidelines are "predicated upon good institutional conduct and program performance." 28 C.F.R. § 2.20 (1981). To that extent, therefore, they do not eliminate rehabilitative considerations. Moreover, the guidelines do not operate in a vacuum. Merely because they are employed by the Commission to determine a presumptive release date for a well-behaved prisoner, without factoring in positive rehabilitative conduct into the parole prognosis determination, does not mean that rehabilitative progress or the lack thereof is ignored in the parole decisionmak-

ing process. Unusually good or bad performance may "justify" a parole release decision earlier or later than the guideline time indicated. 28 C.F.R. § 2.20 (c) (1981). As the Commission stated at oral argument:

> If a person has a bad institutional record, generally it's going to be a record which has developed sometime after the initial hearing, because the initial hearing is held at the beginning of imprisonment. When that prisoner comes up for his second parole hearing, what we call a Statutory Interim Hearing, the Commission will take the original presumptive release date and extend that to some later date based on the seriousness and frequency of the institutional disciplinary violations. Similarly, if a prisoner has an exceptionally good institutional record, the Parole Commission [can] advance[] the release date . . . .

Transcript of Oral Argument 25-26.

Further, the Act's movement away from conditioning parole release on positive institutional behavior, as reflected in the guidelines promulgated pursuant thereto, is supported by legislative history. The Joint Explanatory Statement of the Committee of Conference on the PCRA makes it clear that Congress did not intend to require the Commission to use rehabilitation or any other particular factor in devising its guidelines:

> It is the view of the Conferees that the Parole Commission must make judgments as to the probability that any offender would commit a new offense based upon considerations which include comparisons of the offender with other offenders who have similar backgrounds. The use of predictive devices is at best an inexact science, and caution should be utilized. Such items as prior criminal records, employment history and stability of living patterns

> have demonstrated their usefulness in making determinations of probability over a substantial period of time. These are not written into the statute, however, as *it is the intent of the Conferees to encourage the newly created Parole Commission to continue to refine both the criteria which are used and the means for obtaining the information used therein.*

H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 26, *reprinted in* 1976 U.S. Code Cong. & Ad. News 351, 358-59 (emphasis added). The Conferees pointedly stated that "the weight assigned to individual factors (in parole decisionmaking) is solely within the (commission's) broad discretion." *Id.* at 360.

Additionally, Congress recognized that in many cases the prisoner could do little, if anything, to improve his parole prospects:

> The Conferees intend that this requirement for advice on future parole prospects be narrowly construed. In situations in which the prisoner has been convicted of a serious offense, there may well be nothing that he can do to enhance his parole potential until service of some period of time has been completed. Moreover, promises of parole should not be used to coerce inmate participation in institutional programming.

Id. at 362. We interpret this passage of the Conference Report as an implicit acknowledgement that positive institutional behavior may have little impact on the parole decision.

Distilled to its essence, therefore, appellant's rehabilitation argument seems to resemble a classic Greco-Roman *argumentum ad ignoratium*, to-wit, that since the statute did not *prohibit* a guideline on rehabilitation, the Commission was required to provide

one. We conclude that the statute did not require such a guideline and, even if it did, the guidelines, taken together with the other parole regulations, sufficiently account for institutional behavior in the parole release decisionmaking process for us to uphold the guidelines under the PCRA.

B.

Appellants also contend that the guidelines violate the PCRA because they do not provide for consideration of sentence length in the parole decisionmaking process. To resolve this inquiry, we again must look to the language of the statute and its legislative history. We find that the statute itself makes no explicit mention of the sentence actually imposed as a factor the Commission must consider. Further, as the district court found, it is difficult to construe the general criteria set forth in 18 U.S.C. § 4206(a) as implicitly encompassing sentence length. The lower court reasoned:

> [t]he twin conclusions that release of a prisoner would not "depreciate the seriousness of his offense or promote disrespect for the law," and would not "jeopardize the public welfare" are reached by examining "the nature and circumstances of the offense" and "the history and characteristics of the prisoner." 18 U.S.C. § 4206. Thus, the Commission must review the character of the *offense*, not the sentence imposed for that offense. Arguably, "the history and characteristics of the prisoner," 18 U.S.C. § 4206(a), could include the sentence he is currently serving. When Congress expressly itemized the information that the Commission is required to consider, however, it failed to specify sentence length. Instead, Congress included in the list "recommendations regarding parole . . . by the sentencing judge." 18 U.S.C. § 4207(4).

Geraghty, 552 F. Supp. at 287 (emphasis in original).

In addition, the legislative history does not reveal any intent on the part of Congress to require the Commission to consider sentence length in making its parole release decisions. In fact, the Conference Report indicates that the substance of the judgments made by the Commission under 18 U.S.C. § 4206 is completely within its discretion. H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 26, *reprinted in* 1976 U.S. Code Cong. & Ad. News 351, 358. Further, the Conference Report states:

> Determinations of just punishment are part of the parole process, and these determinations cannot be easily made because they require an even-handed sense of justice. . . . it is important for the parole process to achieve an aura of fairness by *basing determinations of just punishment on comparable periods of incarceration for similar offenses committed under similar circumstances.*

Id. (emphasis added). Finally, the Conference Report characterizes parole as having "the practical effect of balancing differences in sentencing policies and practices between judges and courts." *Id.* at 352. A finding that the parole decisionmaking process must use the individual sentence length as its starting point would frustrate these directives. Moreover, as previously set forth, the minimum incarceration ordered by the sentencing judge must always be respected by the Commission, depending upon whether the sentence is imposed under 18 U.S.C. §§ 4205(a), 4205(b)(1), or 4205(b)(2). We hold, therefore, that although the guidelines do not explicitly consider sentence length as part of the parole decisionmaking process, this failure does not violate the PCRA. On the contrary the statute instructs the Commission to use its own judgment in factoring sentence length because sentencing and parole are separate, although related, processes.

VI.

This brings us to Geraghty's final contention that a statutory construction by us that the PCRA properly authorizes the guidelines would render the statute unconstitutional as either an impermissible delegation of a judicial function or a standardless delegation of a legislative function.

A.

Geraghty's constitutional attack starts where his attack on the validity of the guidelines left off. He argues that the Commission cannot, as it is directed to do, attempt to eliminate sentence disparity if it ignores the length of the sentence imposed by the trial judge. However, if, as we have just concluded, the Commission need not expressly consider sentence length in the parole decisionmaking process, then, in effect, it is making sentencing decisions. If such decisions are properly authorized by PCRA, appellant continues, the statute, as so construed, would violate the Constitution as an impermissible delegation of a judicial function to the executive. As authority for both these arguments, appellant seizes on a statement by our court, speaking through Judge Adams, in *Geraghty v. United States Parole Commission:*

> When . . . the parole authority focuses consideration entirely on factors of deterrence, incapacitation and retribution, it takes into account almost exclusively the very factors that are available to the sentencing judge. . . . At least where the prior determinations of the judicial branch are given no weight, therefore, serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined.

579 F.2d at 261. But this statement of our court must be considered in light of the development of our law. When

Geraghty was decided, its approach was congruent with this court's views, as summarized in *Addonizio v. United States*, 573 F.2d 147 (3d Cir. 1978), *rev'd*, 442 U.S. 178 (1979):

> In the seminal case of *United States v. Salerno*, 538 F.2d 1005 (3d Cir. 1976), this court formulated a rule that resentencing is required in a § 2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of a sentence pursuant to 18 U.S.C. § 4208(a)(2). In that case we found that the sentencing judge's intentions had been clearly stated at the time of sentencing. Subsequently, in *United States v. Somers*, 552 F.2d 108, 113 (3d Cir. 1977), we emphasized that "the intent and expectation of the district court judge who sentences under § 4208(a)(2) . . . are controlling and . . . must be searched out to determine if relief may be ordered under 28 U.S.C. § 2255." Further, we said that "in our judgment, there can be no better evidence or a sentencing judge's expectations or intent than his own statement of those facts," *id.*, and determined that the intent or expectation could be derived from the sentencing judge's statement at the § 2255 hearing. In *United States v. Solly*, 559 F.2d 230 (3d Cir. 1977), we extended the rule of *Salerno* and *Somers* to a sentence imposed pursuant to 18 U.S.C. § 4208(a)(1).

573 F.2d at 150 (footnote omitted). Our opinion in *Addonizio*, issued two weeks prior to our opinion in *Geraghty*, represented the high water mark of this court's stated philosophy that notwithstanding intervention of parole guidelines, "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible." 573 F.2d at 152. Speaking through the writer of the present opinion, we stated:

> The rationale underlying this broad discretion afforded the sentencing judge is the same as that supporting the latitude given the trial judge in his other discretionary functions, namely, "the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more." M. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 663 (1971). Given this near-absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the greatest extent possible.

573 F.2d at 152. The observations of the *Geraghty* panel relied on by appellant reflect this philosophy precisely.

But this court's approach, as reflected in *Geraghty* and *Addonizio*, was not approved by the Supreme Court. In *United States v. Addonizio*, 442 U.S. 178 (1979), the Court forcefully and totally rejected the accretion of precepts emphasizing the importance of the sentencing court's views as reflected in our *Salerno, Somers, Solly, Addonizio and Geraghty* opinions.[7]

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7. Recently, a panel of this court stated:

> [n]otwithstanding *Geraghty*'s vacatur on other grounds [by the Supreme Court] and the fact that its holding represents the minority position in the federal appellate courts, . . . *Geraghty* appears to have retained its vitality as the law of this Circuit. *see United States v. Ferri* . . ., 652 F.2d at 327-28; *United States ex rel. Goldberg v. Warden* . . ., 622 F.2d at 65. However, to the extent that the vacatur may still be said to have undermined its force as binding precedent, we now reaffirm *Geraghty*'s holding and adopt its reasoning as our own.

United States ex rel. Forman v. McCall, No. 82-3021 (3d Cir. filed June 10, 1983). Although this statement could be taken to suggest

Where we had stated that "the sentencing judge's intention and expectation as to the actual time of *incarceration* should be vindicated to the greatest extent possible," 573 F.2d at 152 (emphasis supplied), the Supreme Court flatly said:

> The import of this statutory scheme is clear: the judge has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met.

Addonizio, 442 U.S. at 190. The Court made it crystal clear that

> [t]he decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges. The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.

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that our court's decision in *Geraghty* remains alive, even after *Addonizio*, we decline to read it that way. As *Forman* concerned only the issue of whether retroactive application of the parole guidelines constitutes a violation of the ex post facto clause, we limit its reaffirmation of *Geraghty* to that issue.

Id. at 188-89 (footnotes omitted). Although in *Geraghty* the Supreme Court was careful to explain that it was not meeting the precise question now before us — whether the statute, if construed to allow for the guidelines then becomes an unconstitutional infringement by the executive into the area of judicial decisionmaking — we conclude that its previous decision in *Addonizio* requires a rejection of appellant's present constitutional contention.

Although the Court in *Addonizio* did not couch its decision in constitutional terms, we suggest that it would be attributing to the Supreme Court maximum dalliance in sophistry to argue that it might vigorously state in 1979 a doctrine that severely limited the sentencing court's powers vis-a-vis the PCRA, and later, in this or another case, entirely undercut its reasoned and powerful substantive decision and say, "Oops, our unanimous decision in 1979 was patently unconstitutional!" We refuse to impute such jurisprudential fickleness to the highest court of this land. Accordingly, we believe that the reasoning of *Addonizio* also controls our resolution of appellant's impermissible delegation of judicial authority argument. In addition to our conviction that *Addonizio* is dispositive, we also hold that the PCRA, construed so as to authorize the guidelines, does not violate the separation of powers doctrine. We now turn to that analysis.

B.

The federal Constitution, unlike some state constitutions, has no express provision which prohibits the officials of one branch of government from exercising functions of the other branches. Instead the doctrine of separation of powers is inferred from the fact that the legislative, executive, and judicial functions are described in three separate articles of the Constitution. *Springer v. Philippine Islands*, 277 U.S. 189, 201

(1928). The Constitution does not require three airtight departments of government. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). As Chief Justice Warren observed in *United States v. Brown*, 381 U.S. 437, 443 (1965):

> This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

The separation of powers inquiry is not so much a review of theoretical abstractions of "who ought to do what" as it is a pragmatic analysis of the extent to which an act by one branch of government prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. *Nixon*, 433 U.S. at 443.

Unlike interpreting the Constitution or adjudicating disputes, sentencing is not inherently or exclusively a judicial function. *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (no inherent judicial power to suspend operation of a term of imprisonment). The legislature can limit the judiciary's authority to impose a probationary sentence, *United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979)(in banc), require that a mandatory term of years be imposed, *United States v. Davis*, 560 F.2d 144 (3d Cir.), *cert. denied*, 434 U.S. 839 (1977), or preclude a rehabilitative sentencing option, *Marshall v. United States*, 414 U.S. 417 (1974). Circumscribing the judiciary's authority as to what length of imprisonment may be imposed has been found to be proper invasion of that branch's authority. *Smith v. United States*, 284

F.2d 789 (5th Cir. 1960) (upholding constitutionality of 18 U.S.C. § 2114 requiring imposition of maximum term); *United States v. Lewis*, 300 F. Supp. 1171 (E.D. Pa. 1969) (upholding constitutionality of 26 U.S.C. § 7237 requiring imposition of mandatory sentence).

Recent Supreme Court decisions describe the interaction of the three branches of government in sentencing. Deciding what factors a judge may consider in imposing incarceration, the Court in *United States v. Grayson*, 438 U.S. 41, 47 (1978), set out the respective roles of the judiciary and the executive branch:

> [T]oday the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term. See 18 U.S.C. § 4205 (1976 ed.).

As we emphasized earlier, *Addonizio* reiterated this three-way sharing of responsibility in which Congress sets the statutory maximum sentence, the courts impose sentences within those limits, and the Commission establishes release dates within the eligibility range of the courts' sentences. Both *Addonizio* and *Grayson* echo Chief Justice Warren's observation on the separation of powers doctrine that "a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation." *United States v. Brown*, 381 U.S. at 443.

Acknowledging these principles, courts that have expressly ruled on this issue have determined that the parole guidelines adopted under the PCRA do not un-

constitutionally infringe on a judicial function. *See e.g., Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir. 1982); *Page v. United States Parole Commission*, 651 F.2d 1083 (5th Cir. 1981); *Priore v. Nelson*, 626 F.2d 211 (2d Cir. 1980); *Moore v. Nelson*, 611 F.2d 434 (2d Cir. 1979); *Joost v. United States Parole Commission*, 535 F. Supp. 71 (D. Kan. 1982); *Hawkins v. United States Parole Commission*, 511 F. Supp. 460 (E.D. Va. 1981), *aff'd*, 679 F.2d 881 (4th Cir. 1982); *Wilden v. Fields*, 510 F. Supp. 1295 (W.D. Wis. 1981); *Garcia v. United States Board of Parole*, 409 F. Supp. 1230 (N.D. Ill. 1976), *rev'd on other grounds*, 557 F.2d 100 (7th Cir. 1977).

In sum, if Congress may limit the authority to impose certain punishments, it also may limit the judicial sentencing function to that of imposing maximum and minimum terms, and, without offending the Constitution, establish in the executive branch a parole commission which, within those judicially-imposed limits, makes a completely independent decision as to the actual release date. Not only is sentencing not an exclusively judicial prerogative, the PCRA does not eviscerate the effect of the judge's selection of a particular sentence length. The Commission may not require a prisoner to spend a single day in prison longer than his judicial sentence dictates, regardless of whether it thinks that the judge mischaracterized the nature of the offense or the offender's potential for committing further harm. In addition, the Commission may not release a prisoner even one day earlier than his judicially set parole eligibility date unless permission is obtained from the court under 18 U.S.C. § 4205(g).[8]

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8. 18 U.S.C. § 4205(g) provides:

> At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

C.

Appellant's final constitutional argument, suggesting that the PCRA is unconstitutional because it represents the standardless delegation of a legislative function, also derives from a single observation made by this court when this case was previously before us. Among the concepts we suggested that plaintiff had to establish at trial to give force and sinew to his constitutional argument was, in our words, the possibility that the PCRA "delegate[s] so crucial a legislative function [as the redrafting federal criminal penalties] to a nonrepresentative body with no standards other than a direction that the results 'not depreciate the seriousness of the offense' and 'be consistent with the public welfare.'" *Geraghty*, 579 F.2d at 263. We have carefully examined the record and conclude that appellant failed at trial to supply evidence or provide legal authorities to demonstrate that the PCRA delegates impermissible public policymaking prerogatives to the Commission or that the statute is void of ascertainable standards against which a court may measure the Commission's exercise of discretion.

Simply stated, the PCRA does not permit the Commission to redraft federal criminal statutes. As succinctly explained by the district court:

> It is clear from . . . the interaction between the statutory maximum, the sentence imposed, and the parole release date, that the guidelines do not perform any such function. The federal criminal statutes, on the one hand, fix the maximum penalties for the crimes they define. The guidelines, on the other hand, operate *within* the limits set by the statute, as well as within the confines of the sentence. Moreover, . . . the guidelines specify time ranges for the *typical* length of imprisonment before parole, as opposed to *maximum* time periods

> set by statute, for various combinations of offense severity and offender characteristics.

Geraghty, 552 F. Supp. at 292 (emphasis in original). What appellant does not recognize — or perhaps refuses to — is that because the guidelines establish the time to be served before release in the *typical* case, they do not conflict with or assume the legislative function of setting maximum penalties for the most heinous ones.

Yet, even if the statute could be construed as delegating some legislative power to the Commission, we think that compared to other administrative law precedents it withstands constitutional attack. Courts have consistently upheld much more expansive delegations of authority to agencies to regulate the conduct of members of the public. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (price controls imposed under Emergency Price Control Act of 1942); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 81 (1940) (sales tax imposed under Bituminous Coal Conservation Act); *United States v. Gordon*, 580 F.2d 827 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978) (drug control standards established by the Comprehensive Drug Abuse Prevention and Control Act). In fact, the Supreme Court has declared statutes unconstitutional on the basis of an improper delegation of a legislative function on only two occasions. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

Accordingly, we determine that the statutory criteria set forth by Congress in 18 U.S.C. § 4206 are sufficiently specific to guide the Commission in making parole release decisions. They identify the duties and responsibilities of the Commission and enable a reviewing court to determine whether the guidelines use statutorily permissible parole factors. *See Bowles v. Willingham*, 321 U.S. 503, 515 (1944). In addition, the legisla-

tive history of the PCRA discusses in some detail the interpretation of virtually every phrase in § 4026, thereby giving the Commission and the courts added insight into how parole decisions should be made under the statute. H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 25-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News 351, 357-60.

These two sources — statutory text and legislative history — provide far more guidance as to the will of Congress in enacting the statute than the standards that have been used to sustain other delegations of legislative power. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (permitting recovery of "excessive profits" earned on war contracts); *Yakus*, 321 U.S. at 427 (permitting price controls that are "generally fair and equitable"); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (permitting Commission to fix "just and reasonable" rates for natural gas); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (permitting licensing of radio communications "as public interest, convenience or necessity requires"); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932) (permitting consolidation of carriers when "in the public interest"). It is clear, therefore, that the delegation of a legislative function need not be accompanied by a precise formula for the agency to apply. Instead, Congress need only lay down an "intelligible principle" to which the agency must conform. *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974); *Hampton v. United States*, 276 U.S. 394, 409 (1928). The standards given to the Commission amply satisfy this requirement.

Further, courts that have expressly considered the question of whether the PCRA violates the Constitution as an impermissible delegation of a standardless legislative function have determined that it does not. *See, e.g.,*

Priore v. Nelson, 626 F.2d 211 (2d Cir. 1980); *Moore v. Nelson*, 611 F.2d 434 (2d Cir. 1979); *Wilden v. Fields*, 510 F. Supp. 1295 (W.D. Wis. 1981). *Cf. Bachman v. Jeffes*, 488 F. Supp. 107 (M.D. Pa. 1980) (upholding under state constitution a Pennsylvania statute requiring the Board to consider if and when release from a judicially imposed term of confinement should occur). Congress is presumed to have acted within the bounds of the Constitution in enacting legislation. *Fleming v. Nestor*, 363 U.S. 603, 617 (1960). That presumption is strongly supported by our analysis of the PCRA.

VII.

Accordingly, we will affirm the judgment of the district court in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN M. GERAGHTY, individually and on behalf of a class,	)	
Plaintiffs,	)	Civil Action 76-1467
-vs-	)	
UNITED STATES PAROLE COMMISSION, et al.,	)	
Defendants.	)	

MEMORANDUM

I. INTRODUCTION

This action was initiated on September 15, 1976 when Plaintiff Geraghty filed a complaint seeking declaratory and injunctive relief in the United States District Court for the District of Columbia. Plaintiff attacked the Parole Commission and Reorganization Act, P.L. 94-233, 18 U.S.C. §§4201 et seq. (hereafter referred to as "PCRA"), and the regulations and guidelines promulgated thereunder, 28 C.F.R. §2.20. The District of Columbia federal

court ordered the case transferred to us on November 12, 1976 and we received the file on December 3, 1976.

Plaintiff Geraghty was convicted in the United States District Court for the Northern District of Illinois of conspiracy to commit extortion, 18 U.S.C. §1951, and of making false material declarations to a grand jury, 18 U.S.C. §1623. Geraghty had used his position as a vice squad officer on the Chicago police force to extort money from dispensers of alcoholic beverages. The false declarations concerned his involvement in this shakedown. Geraghty was sentenced to concurrent prison terms on January 25, 1974. His conviction was affirmed in United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert denied, 421 U.S. 910. (1975). The sentencing judge later reduced Geraghty's sentence because the parole guidelines would not have indi-

cated parole before the expiration of his sentence. United States v. Braasch, No. 72 C.R. 979 (N.D. Ill. 1975), appeal dis'd and mandamus denied, 542 F.2d 442 (7th Cir. 1976).

Geraghty had applied for release by parole and had been denied in January of 1976. He applied again in June of 1976. The Parole Commission decided that a release date outside the parole guidelines did not appear warranted. Geraghty was therefore required to stay in prison, unparoled, until the expiration of his sentence, less good-time credits. Subsequent to the second denial of parole, Geraghty instituted this civil action by filing the complaint. On February 24, 1977, we denied Plaintiff's motion to certify a class, construed the action as a habeas corpus proceeding, and granted the Defendants' motion for summary judgment. Geraghty v.

United States Parole Commission, 429 F.Supp. 737 (M.D.Pa. 1977).

Geraghty, individually and on behalf of the class, appealed. On June 30, 1977, before any briefs were filed with the circuit court, Geraghty had been mandatorily released from prison upon expiration of his sentence. Both the Third Circuit Court of Appeals and the United States Supreme Court held that they had jurisdiction to hear the appeal of a plaintiff whose request for class certification had been denied, even if the claims of that plaintiff were made moot before the appellate courts could rule on the class issue.

The Third Circuit Court of Appeals, on March 9, 1978, reversed and remanded the case to us. Geraghty v. United States Parole Commission, 579 F.2d 238 (3d Cir. 1978). The circuit court ruled that this case is not necessarily a habeas corpus

action. "The class does not demand that its members be released on parole, but only that the Parole Board not utilize the guidelines in evaluating future parole applications." Geraghty, 579 F.2d at 244. The court concluded that this action could properly proceed as an action for declaratory judgment. Id. The court also ruled that we erred in failing to consider sua sponte the possibility of creating subclasses when we denied class certification. Id. at 252-53. Finally, the court decided that certain factual issues existed concerning the guidelines' lawfulness, thereby precluding the entry of summary judgment.[1] Id. at 268.

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[1] The court also expounded at some length, although in dicta, on the merits of the lawfulness of the PCRA and the guidelines. 579 F.2d at 254-67.

The United States Supreme Court granted certiorari, 440 U.S. 945 (1979), and, on March 19, 1980, issued its opinion vacating the decision of the Court of Appeals for the Third Circuit and remanding the case for further proceedings. 445 U.S. 388 (1980). The Supreme Court rejected the circuit court's suggestion that we should have, sua sponte, considered subclasses when we rejected the proposed class. Id. at 408. The Court ruled that, on remand, it was our responsibility to determine the class issue anew and to decide whether Geraghty or some other representative can press the class claims.

On December 10, 1980, we reviewed Plaintiff's motions to certify a class and to amend the complaint and granted them in part and denied them in part. We certified the following class:

> All federal prisoners in the Middle District of Pennsylvania who are, or will become, eligible for parole release under 18 U.S.C. §4205(a), and who have been, or who will be, denied parole and continued to the expiration of their sentence.

We limited the class certification to two of the five legal issues advanced by Plaintiff. First, is the PCRA facially unconstitutional? Second, are the regulations promulgated under the PCRA, especially the guidelines for decision-making, arbitrary and unlawful?[2]

By that same December 10, 1980 order, we dismissed the remaining three issues: first, the ex post facto effect of retroactive application of the guidelines to prisoners sentenced before the effective

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[2] Plaintiffs' counsel argues that we need only consider the constitutionality of the PCRA if we believe the guidelines are consistent with it. We agree that if we find that the guidelines are unlawful, then we need not address the PCRA issue.

date of the PCRA and its regulations; second, the lawfulness of the application of the guidlines to prisoners in parole considerations; and last, the treatment of prisoners sentenced under 28 U.S.C. §4205(b)(1) and (b)(2) compared to prisoners who received regular adult sentences and who are eligible for parole after serving one-third of their sentence. On December 30, 1980, an amended complaint was filed, with leave of court, adding Edward Levine as a party plaintiff. We approved the type of notice to the class on May 18, 1980 and held a non-jury trial on June 29, 1981. The transcript, exhibits, and briefs have now been filed and we will proceed to resolve this case on the merits.

II. BACKGROUND OF THE PCRA

A. General

In 1910, Congress enacted the first legislation authorizing the parole of fede-

ral prisoners.[3] Act of June 25, 1910, ch. 387, §1, 36 Stat. 819. Not until 1973, however, did the federal parole authority establish published regulations governing parole decisionmaking. 38 Fed.Reg. 26,652 (1973). Under the direction of the lead Defendant's predecessor, the United States Board of Parole, an experiment with the use of guidelines for parole decisions was conducted and found to be helpful in resolving problems in the federal parole system.[4]

In apparent approval of the system devised by the Board of Parole, Congress enacted the PCRA in 1976, creating Defendant

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[3] For the general background and at least one commentator's view of the present federal parole system, see Comment, Federal Parole Decisionmaking: Judicial Review for the Fortunate and Few, 85 Dick.L. Rev. 501 (1981).

[4] M. Gottfredson, P. Hoffman, & L. Wilkins, Guidelines for Parole and Sentencing 18-37 (1976). See Section III.A. infra.

United States Parole Commission (hereafter referred to as "the Commission"), 18 U.S.C. §4302, and requiring it to promulgate guidelines. 18 U.S.C. §4203(a)(1).[5] The statute also mandates parole decisions in accordance with the guidelines promulgated under 4203(a)(1) unless the Commission determines that there is good cause for departing from the guidelines. 18 U.S.C. §4206(c).[6]

The general criteria for making parole decisions set forth in the PCRA are as follows:

> If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confin-

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[5] But see Geraghty v. United States Parole Commission, 579 F.2d 238, 257 & n.82 (3d Cir. 1978) (specifics of the existing guidelines were under some attack).

[6] Section 4206(c) also requires the Commission to provide the prisoner with written reasons for its decision to grant or deny parole authority notwithstanding the guidelines.

ed, and if the commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

18 U.S.C. §4206. Congress enumerated certain material that the Commission was required to consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

B. Legislative History

Congress began consideration of parole reform legislation in 1972 with the introduction of House Bill 13118 and Senate Bill S2883.[7] Successsive sessions of Congress examined proposed amendments to the parole statute. On May 13, 1975, the House Judiciary Committee reported H.R. 5725, accompanied by House Report 94-184.

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[7] At the beginning of the 92nd Congress, the House Subcommittee on Court, Civil Liberties, and the Administration of Justice undertook an extensive nationwide review of the problems of the penal justice system. H.R.Rep. No. 94-184, 94th Cong., 1st Sess. (1975). The Subcommittee on National Penitentiaries of the Senate Judiciary Committee also began seeking legislative answers to the criticisms directed at the parole process. Following the appointment of Maurice H. Sigler as Chairman of the U.S. Board of Parole in 1972, a working relationship developed between the board and the two Subcommittees. H.R.Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S.Code & Ad.News 351, 259.

See H.R. Rep. No. 94-184, 94th Cong., 1st Sess. (1975). It was considered and passed by the House on May 21, 1975. 121 Cong. Rec. 15716. The Senate Judiciary Committee reported an amended version of H.R. 5727 on September 11, 1975, accompanied by Senate Report 94-369. See S.Rep. No. 94-369, 94th Cong., 1st Sess. 25, reprinted in [1976] U.S. Code Cong. & Ad.News. 335. The amended version was passed by the Senate on September 16, 1975. The House and Senate versions differed markedly in their approaches to the problems of parole reform.

1. The House Bill

The most distinguishing feature of the House Bill was the presumption it created in favor of parole at the time of eligibility. Section 4205 of the House Bill provided that

> (a) A prisoner shall be released on parole if his record shows that he has

substantially observed the rules of the institution in which he is confined on the date of his eligibility for parole, unless . . .

(1) there is a reasonable probability that such prisoner will not live and remain at liberty without violating any criminal law;

(2) there is a reasonable probability that such release would be incompatible with the welfare of society; or

(3) the prisoner's release on such date would so deprecate the seriousness of his crime as to undermine respect for the law.

H.R.Rep. No. 94-184, supra, at 20 (emphasis added).[8]

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[8] Section (b) of Section 4205 of the House Bill stated:

> Any prisoner not earlier released under subsection (a) . . . shall be released on parole after he has served two-thirds of his sentence, or after twenty years in the case of a sentence of thirty years or longer . . . whichever is earlier, unless it is determined that he should not be so released because there is a high likelihood that he will engage in conduct violating any criminal law.

In most instances a prisoner would be eligible for parole, at the latest, after he had served one-third of his sentence.[9]

Section 4206 of the House Bill specified the information to be considered in making a parole determination:

> [T]here shall be taken into account the factors established by the Commission under section 4204(a)(1) [authorizing the promulgation of general policies, guidelines, rules and regulations]; and
>
> (1) any reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) any official report of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

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[9] If a prisoner is serving a definite term of over 180 days, he is eligible for parole at the one-third point in his sentence. The sentencing court, however, could specify a minimum term to be served, not more than one-third of the maximum, or direct that the prisoner be immediately eligible for parole. H.R.Rep. No. 94-184, supra at 4-5.

(3) any presentence investigation report;

(4) any recommendation regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) any reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

Id. at 21. In addition, the House Report declared: "It is the intent of the Committee that all available information on the efforts that the prisoner may have made to improve his education, skills, or personal attributes be considered by the Commission." Id. at 6. House Bill 5727 also required the Commission to furnish the prisoner with written reasons for its decision, including a summary of the evidence relied upon if parole is denied, and directed the examining panel "to advise the prisoner of what he ought to do to en-

hance his prospects for parole." Id. at 7. These latter provisions were aimed at providing "an infusion of due process into Federal Parole procedure," to correct a system the House Committee viewed as "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." Id. at 2.

2. The Senate Bill

The Senate Bill, in contrast, was couched in more conservative terms. While acknowledging the criticism directed at the existing parole system and the need for "both the fact and appearance of fairness to all," the Senate Committee on the Judiciary also recognized the importance of balancing concern for equity toward the individual inmate against "responsibility for the protection of the larger society." S.Rep.No. 94-369, 95th Cong., 1st Sess.

25, reprinted in [1976] U.S.Code Cong. & Ad. News 335, 340.

The Senate Bill eliminated the presumption in favor of parole contained in the House version. Instead, the Senate measure retained existing criteria for making parole decisions at the time of parole eligibility.[10] Parole would not be granted unless the Commission determined that, first, the individual had substantially observed the rules of the institution; second, there is a reasonable probability that he will not violate the law on release; and last, his release is compatible with the general welfare of society. S.Rep. No. 94-369, supra, at 344.

The Senate legislation anticipated the adoption of administrative guidelines to

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[10] The times set for parole eligibility were substantially the same in both the Senate and House Bills. See note 9 supra. they now appear in Section 4205 of the PCRA.

"give definiteness to the indefinite nature of most federal criminal cases -- by reducing the opportunity for sentencing disparity and abuse of discretion and by giving to parole an aura of fairness for both victim and offender." Id. at 340. The Commission was required to meet periodically to establish procedural rules and guidelines for parole determinations "so that the administration of parole throughout the Federal System will be uniform." Id. at 342. The Senate report referred explicitly to the guidelines then in use by the Parole Board as a result of its experimental project. Id. at 340 & 346.[11]

Although the Senate Committee did not intend the existing guidelines to remain unchanged, id. at 340 & 347, the Committee's comments clearly indicated approval of the system. In the language of the Report,

> The guidelines take into account the circumstances of the individual both in his personal life and with respect to the offense which he has committed, as well as measuring the severity of the offense involved so as to significantly reduce the area of discretion which the Parole Commission, in fact, has in any given case. Id. at 340.

Under the Senate Bill, a parole decision pursuant to the guidelines was to be made primarily on the basis of a report prepared by the Bureau of Prisons summarizing the prisoner's criminal and social background, his mental and physical health, and his institutional behavior and participation in institutional problems. Id. at 344. The Commission was also authorized to seek additional information from other government agencies. Id. Once a

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[11] The reference to the promulgation of guidelines in the House Bill, in contrast, was a vague and general one. See H.R.Rep. No. 94-184, supra, §4206(a) at 17. In the House system, with its emphasis on a presumption of parole at a fixed time, the need for definitive guidelines, to provide more certainty in the parole process, was significantly reduced.

parole decision was made, the inmate was to receive a written statement of the determination, including an "understandable explanation" of the application of the guidelines, or of the factors causing a determination outside the guidelines. Id. at 346.

3. The Conference Report

The bill that emerged from the House-Senate Conference Committee, which eventually became the PCRA, represented a compromise between the diverse positions of the House and the Senate. The Conference Committee chose to delete the House Bill's presumption of parole at eligibility. Instead, the Conference Report adopted the approach of the Senate version, designating the Parole Commission guidelines as "the fundamental gauge" for a parole policy "which seeks to achieve both equity be-

tween individual cases and a uniform measure of justice." H.R. Conf.Rep. No. 94-838, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S.Code Cong. & Ad.News 351, 359.[12]

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[12] Compare S.Rep. No. 94-369, supra at 340. Although the Conference Report clearly contemplated the use of guidelines and alluded to the reorganization of the Parole Board "along the lines of the legislation presented here," H.R.Conf.Rep. No. 94-938, supra, at 352, the language of the Report does not contain any specific reference to the guidelines then in effect. The circuit court, in its previous decision in this mater, considered this extremely slight change of emphasis from the Senate Report a significant point. See Geraghty, 579 F.2d at 258 & n.91. We respectfully disagree. We read the directive to the Commission to be "cognizant of past criticism of parole decisionmaking," H.R.Conf.Rep. No. 94-838, supra, at 359, as a reference to the lack of uniformity and potential inequity in the previous case-by-case decisionmaking, rather than to the objections to the guidelines voiced during the Congressional debates on the PCRA. See Geraghty, 579 F.2d at nn. 82 & 83. The House and Senate Subcommittees enjoyed a "working relationship" with the Parole Board during the formulation of this legislation, and the Conference Com-
(footnote continued)

Although the conferees eliminated the language in the Senate Report characterizing parole as "an extension of the sentencing process," compare S.Rep. 94-233, supra, at 337 with H.R.Conf.Rep. No. 94-838, supra, at 352, they retained the Senate Report's description of the Bill as "having the practical effect of balancing differences in sentencing policies between judges and courts." Id. Determination of the actual length of incarceration of an offender was committed to the discretion of the Parole Commission. Id. The Commission was designated as the agency "responsible for keeping in prison those who

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(footnote continued)

mittee was surely aware of the guidelines as then employed by the Parole Board. H.R.Conf.Rep. No. 94-838, supra, at 352. Under these circumstances, we find it difficult to avoid construing the absence of express disapproval of any particular feature of the then current guidelines as a form of tacit approval.

because of the need for accountability to society or for the protection of society must be retained in prison." Id. It is the job of the Commission to identify those individuals who are ready to be responsible citizens. Id. The information that the Commission must consider in performing its task was specified -- a list identical to that included in the House Bill [13] -- but the weight to be accorded any particular piece of information was a judgment solely within the province of the commission. Id. at 360.

The Commission's discretionary power to make parole decisions was limited, however, by permitting decisions outside the guidelines only when there is good cause to do so. The Conference Report interpreted good cause as "substantial reason" and "only those grounds put forward by the Commission in good faith and which are not

arbitrary, irrational, unreasonable, irrelevant or capricious." Id. at 359. The Conferees further directed that "[i]f decision to go above or below parole guidelines are frequent, the Commission should re-evaluate its guidelines." Id. at 360.

In any case in which the decision is outside the guidelines the Commission must provide the prisoner with a written explanation setting forth with particularity the reasons, including a summary of the information relied upon. 18 U.S.C. §4206(c). In addition, the hearing examiners, when feasible, must advise the prisoner of what he could do to enhance his prospects for parole. 18 U.S.C. §4208(g). These latter two requirements of the Conference Bill (PCRA) are similar

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[13] Compare 18 U.S.C. §4207, set forth at page 279, supra, with §4206 of the House Bill, quoted at page 280 supra.

to those found in the House Bill, but the conference Report added this significant caveat:

> "The Conferees intend that this requirement for advice on future parole prospects be narrowly construed. In situations in which the prisoner has been convicted of a serious offense, there may well be nothing that he can do to enhance his parole potential until service of some period of time has been completed. Moreover, promises of parole should not be used to coerce inmate participation in institutional programming.

H.R.Conf.Rep. No. 94-838, at 362.

The Conference Bill passed the Senate on March 2, 1979, and the House on March 3, 1976. [1976] U.S.Code Cong. & Ad.News 335.

III. THE GUIDELINES

A. Origin[14]

In 1971, the research staff of the National Counsel on Crime and Delinquency working in conjunction with the United States Board of Parole (hereinafter refer-

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[14] Defendants have argued that the research project from which the original guidelines were developed is not relevant to the question of whether the guidelines are valid under the PCRA. We believe, however, that an examination of the development of the guidelines serves the limited purpose of elucidating the policies the Parole Commission intended to implement by adoption of the guidelines. If these policies are indeed effectuated by the guidelines, it is relevant to consider whether or not they comport with the policies embodied in the PCRA. However, the validity of the research project itself, or even whether the conclusions of the study could legitimately be applied to actual parole decisionmaking are not relevant questions in this case. Therefore, Plaintiffs' Exhibits Numbers 26-46 and 55-61, which concern a 1972 and 1973 parole background study, and on which we previously reserved our ruling, are admitted into evidence for the limited purpose of clarifying the Parole Commission's policies underlying the guidelines.

red to as the "Parole Board", began an extensive study of parole decision-making. One portion of the project involved an examination of parole decisions in Youth Correction Act cases[15] (hereinafter referred to as "YCA") to determine if certain factors -- offense severity, parole prognosis, institutional program participation and institutional discipline -- could predict parole decision-making. (Transcript at 11-12.)[16] One of the conclusions of the project was that of-

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[15] 18 U.S.C. §§5005 to 5026. A sentence under the YCA has no minimum and a maximum of six years. Id. §§5010 & 5017. Offenders committed under the YCA provisions are immediately eligible for parole. Id. §5017(a). The YCA is not applicable if the court finds that the offender would not derive benefit from "treatment," designed to correct the antisocial tendencies of youth offenders. Id. §§5010 & 5016(f).

[16] Hereinafter, the trial transcript will be cited as "Tr."

fense severity and parole prognosis ratings made by members of the Youth Corrections Division of the Parole Board could predict the actual decisions made at initial hearings in YCA cases.[17] (Tr. at 12; Plaintiff's Exhibit 28, P.Hoffman, Parole Selection Practice: Two Feedback Methods, at 71 (unpublished doctoral dissertation)).[18]

The study also found that ratings assigned to institutional discipline were predictive of YCA decisions at review hearings. (Tr. at 12).

Based on the results of this study, the Parole Board structured its policy for future parole decisionmaking around the two factors of offense severity and risk of

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[17] The initial hearing in a YCA case is generally held within three to four months of commitment.

[18] Hereinafter, exhibits introduced at trial will be cited as "Plaintiffs' Ex. No." or "Defendants' Ex.No."

recidivism (Parole prognosis). (Wilkins Deposition at 89, 98-100; Hoffman Deposition at 125). The Parole Board, however, determined to utilize objective measures of offense severity and statistical predictors of parole prognosis rather than ratings based on subjective, individualized judgments made on a case-by-case basis.[19] (Hoffman Deposition at 125.) These objective measures would then be applied to the particular facts of each parole case.[20]

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[19] The assessments made in the YCA study, in contrast, reflected the subjective viewpoints of the Parole Board member as he considered each individual case. (Hoffman Deposition at 122-23.) Dr. Peter Hoffman, who conducted the YCA study, has expressed the opinion that the objective measures exhibit a strong correlation to the subjective judgments recorded in the YCA study. (Hoffman Deposition at 123-24.)

[20] Contemporaneously with the initial promulgation of the parole guidelines, the (footnote continued)

On November 19, 1973, the Parole Board issued its first set of parole policy guidelines. 28 C.F.R. §2.52, as amended 38 Fed.Reg. 31942 et seq. (Nov. 19, 1973). The format was substantially the same as the guidelines currently in use. On May 12, 1976, two days before the PCRA went into effect, the Parole Board published in the Federal Register a set of emergency regulations, including parole guidelines, to implement the PCRA. 41 Fed.Reg. 19326

(footnote continued)

Parole Board was in the process of administratively reorganizing into five regions, 38 Fed.Reg. 26652 (Sept. 24, 1973); delegating to two-member panels of hearing examiners the power to make tentative parole decisions, 28 C.F.R. §2.13, 38 Fed. Reg. 26653 (Sept. 23, 1973); and establishing a two-stage administrative appeal procedure, 28 C.F.R. §§2.20-2.21, as amended 38 Fed.Reg. 26654 (Sept. 23, 1973). Objective measures of determining offense severity and parole prognosis would limit the subjective judgments of the individual hearing examiners and assist in maintaining a consistent parole policy throughout the regions. (See Hoffman Deposition at 125.)

et seq. (May 12, 1976). The Board also published a notice of proposed rulemaking and invited public comment on the emergency regulations. 41 Fed.Reg. 19341 (May 12, 1976). After opportunity for public comment on the proposed regulations, the Commission published a set of final rules, including guidelines, on September 3, 1976. 41 Fed.Reg. 37316 et seq. (Sept. 3, 1976). The guidelines have been amended numerous times in the intervening years, making various refinements to the system.

B. Operation

The guidelines consist of two scales which together determine the range of "customary total time" an inmate must ordinarily serve before parole will be granted. The first case -- the "offense severity scale" -- categorizes a comprehensive list of federal crimes into seven

groupings, ranging from "Low" to "Moderate" to 'Greatest II."[21] The offenses are ranked without regard to the maximum-minimum penalties set by Congress. For each level of severity, the "offense severity scale" lists four ranges of "customary total time." See Appendix I.

The second scale, known as the "salient factor scale," measures parole prognosis. The salient factor score is the sum of points assigned by the Commission to seven items in the inmate's background. Five of these items deal with previous criminality, one considers opiate dependence, and one considers recent employment or school attendance. See Appendix II. In theory, the higher the score, the lower the probability of recidivism will be. A clinical evaluation of risk, however, may override

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[21] Aggravating circumstances increase the severity of the rating.

the salient factor score. 28 C.F.R. §2.20(e).

After determining the offense severity and calculating the salient factor score the Commission places the particular inmate's score and severity rating on a grid, and thus arrives at the customary total time to be served before release. The customary total time has no relationship to the sentence actually imposed on the inmate, although no inmate can be detained beyond the maximum term set by the court or released before any minimum term the sentencing judge might designate. (Tr. at 48.) Furthermore, the guidelines are designed for cases with good institutional adjustment and program progress. 28 C.F.R. §2.20(b). Substantial observance of institutional rules is a threshold requirement for consideration for parole. 18 U.S.C. §4206(a).

The regulations specifically designate the "customary total time" ranges as "merely guidelines." "Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered." 28 C.F.R. §2.20(c). According to the Commission's own statistics (Plaintiffs' Ex. No. 24, United States Parole Commission Research Unit, Report 18: Workload and Decision Trends 10/74-9/77 (December 1977); Plaintiffs' Ex. No. 25, United States Parole Commission Research Unit, Report 24: Workload and Decision Trends, Fiscal Years 1978-1980 (January 1981), approximately eighty percent of the decisions at initial hearings fall within

the customary total time recommended by the guidelines.[22]

IV. DISCUSSION

A. Validity of the Guidelines

Plaintiffs attack the guidelines on the

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[22] A decision to deny parole and continue to expiration because a prisoner's sentence is too short to allow him to serve the customary total time is counted by the Commission as a decision within the guidelines. (Tr. at 56.)

The question of whether the guidelines are mechanically applied is not at issue in this case. We are concerned only with the facial validity of the regulations. We agree, however, with the court in Garcia v. Neagles, 660 F.2d 983, 991 (4th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1023 (1982), that given the clear directive of the Conference Report to re-evaluate the guidelines when decisions outside the guidelines are too frequent, H.R.Conf.Rep. No. 94-838, supra, at 360, less than 80% conformity with the guidelines may well violate the statute.

Although we have referred to Plaintiffs' Exhibit Nos. 24 and 25, they relate to the application issue and are irrelevant to this action. Nevertheless, we admit these exhibits as well as Exhibits 21-23, on which we also reserved our ruling at trial, for purpose of possible appeal.

ground that they violate the PCRA in the following particulars:

> First, rehabilitation and institutional behavior are not afforded any significant weight in the decision to grant parole;[23]
>
> Second, the Commission may disregard the sentence actually imposed; and
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> Last, the Commission has devised its own system of measuring accountability.[24]

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[23] Plaintiffs raise as a separate and distinct ground for invalidating the guidelines another issue, that is, that under the guidelines institutional behavior operates only as a negative factor in the parole decision. We think that this issue is subsumed within the more general operation of whether the guidelines impermissibly exclude meaningful consideration of rehabilitation and institutional performance.

Defendants object that Plaintiffs lack standing to challenge the treatment of institutional behavior under the guidelines. We find this position to be without merit.

[24] Although we have chosen to treat this question as a separate issue, it is obviously related to the second issue, the freedom the Commission has to disregard actual sentence length.

1. Rehabilitation and Institutional Performance

It is axiomatic that in considering the validity of any regulation promulgated under a statute, one must first look to the language of the statute itself. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975). Our initial analysis, therefore, must juxtapose the Plaintiffs' contentions against the pertinent provisions of the PCRA.

Plaintiffs claim that in the PCRA Congress "has explicitly directed" that rehabilitation and institutional behavior "remain central in parole decisionmaking." (Plaintiffs' Post-Trial Brief at 29.) They assert that the statutory language is not consonant with the elimination of rehabilitation as the primary focal point in the parole process, and does not authorize the Commission to consider institutional behavior only as a negative factor.

We cannot agree, however, that the statute on its face places its primary emphasis on the rehabilitation of the inmate. To the contrary. Section 4206 mentions several factors that must be included in the review of every prisoner's case: substantial adherence to the rules of the institution, the nature and circumstances of the offense, the history and characteristics of the prisoner. Thus, "Section 4206 does not state that good institutional adjustment is a major factor in determining whether to parole, but rather only one of many factors." Hayward v. United States Parole Commission, 659 F.2d 857, 861 (8th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1991 (1982).

Furthermore, the only explicit reference to institutional behavior in the statute is phrased in terms of a prerequisite to parole, that is, "[i]f an eligible pri-

soner has substantially observed the rules of the institution . . . " 18 U.S.C. §4206(a) (emphasis added). The language would appear to sanction the use of institutional performance as a negative factor. We hesitate to find, however, that the statute excludes the possibility of a positive use for the inmate's institutional record. Section 4207 requires the Commission to consider, inter alia, "reports and recommendations which the staff of the facility . . . may make." 18 U.S.C. §4207(1). Reading this section of the statute together with §4206, therefore, we think that the inmate's institutional behavior is part of the "history and characteristics of the prisoner" that must be reviewed by the Commission.

Plaintiff argues that since positive information regarding institutional behavior is not taken into account in calculat-

ing the "salient factor score," and the initial hearing is held within 120 days of incarceration, 28 C.F.R. §2.12(a), the inmate's record at the institution and his progress toward rehabilitation have a negligible impact. See Moore v. Nelson, 611 F.2d 434, 438 n.8 (2d Cir. 1979). We note, however, that a clinical evaluation of risk may override the salient factor score, 28 C.F.R. §2.20(e), and that the Commission may depart from the guidelines when there is "good cause" to do so. 18 U.S.C. §4206(c). Moreover, at subsequent hearings, "significant developments or changes in the prisoner's status" are taken into consideration. 28 C.F.R. §2.14(a). Under 28 C.F.R. §2.14(a)(2)(ii), a presumptive release date may be

advanced for "superior program achievement." Id.[25] See also 28 C.F.R. §2.60.

While we think that the role played by institutional factors under the guidelines is entirely consistent with the language of the PCRA on its face, we recognize that regulations such as these may fulfill the letter of the legislation, yet simultaneously contravene the spirit of the statute. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). A careful analysis of the legislative history is in order, therefore, to remove any lingering doubts about the validity of the guidelines in regard to this issue.

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[25] The regulations governing the initial and interim hearings and the provision for "superior program achievement" technically are not part of the guidelines challenged by Plaintiffs. Nevertheless, we agree with the Defendants that the guidelines must be examined in the context of the entire parole system in order to determine if the regulations violate the PCRA.

We have previously set forth the sequences of legislative reports and summarized the significant reports accompanying them.[26] The entire tenor of the original legislation passed by the House, and the report accompanying the bill, indicates an emphasis on the concerns of the individual inmate. Discussing the information that must be considered by the Commission, the House Report speaks in terms of "the efforts . . . to improve his [the inmate's] education, skills, or personal attributes. . ." H.R.Rep. 94-184, supra, at 6 (emphasis added). See page 280, supra. In addition, under the House version of the bill, if parole was denied,

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[26] Although only the Conference Report directly expresses the intent of Congress in regard to the PCRA, the conferees did not write in a vacuum. Perusal of the House and Senate Reports is helpful, therefore, in our attempt to ascertain the proper interpretation of the Conference Report itself.

the prisoner was to be advised of what he could do to improve his prospects for parole. H.R.Rep. No. 94-184, supra, at 7. See page 281, supra. Clearly, the House Bill contemplated rehabilitation as playing a significant role in the parole process.

In the Senate Report, the focus of the legislators shifted. Although we do not think that rehabilitation and institutional progress were eliminated as factors by the Senate Subcommittee, the emphatic language of the House Report does not appear in the Senate Report.[27] Instead, the Senate Report all but endorsed the guidelines as developed by the Parole Board.

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[27] In the Senate Report, the inmate's institutional behavior and participation in institutional programs are merely mentioned as among those items the Bureau of Prisons would include in its summary of the inmate's background. S.Rep. No. 94-369, supra, at 344. See page 281 supra.

Although the bill that came out of the House-Senate Conference effected a compromise between the respective positions of the two houses, in our view the Conference Report embraces the basic approach taken by the Senate. See page 282, supra. The guidelines were retained as the mainstay of the legislation. More importantly, the formulation of the guidelines was committed to the Commission. Congress expressly declined to write into the statute the precise method by which parole performance would be predicted because it was the intent of the Conferees "to encourage the newly created Parole Commission to continue to refine both the criteria which are used and the means for obtaining the information used therein." H.R.Conf.Rep. No. 94-838, supra, at 359. Moreover, while the PCRA incorporated the information which the House Bill required to be

considered in each parole decision, the Conferees pointedly stated that "the weight assigned to individual factors (in parole decision-making) is solely within the province of the (commission's) broad discretion." Id. at 360 (emphasis added). Assessing the same issue that we now face, the court in Wilden v. Fields, 510 F.Supp. 1295 (W.D.Wis. 1981), found this expression of legislative intent conclusive evidence of the validity of the guidelines. Id. at 1305. See also Shahid v. Crawford, 599 F.2d 666, 670 (5th Cir. 1979) (Congress intended Commission, not courts, to decide significance of particular information about prisoners). We agree. We note, in addition, the limiting construction placed by the Conferees on the provision adopted from the House Bill directing the hearing examiners to advise the prisoner of steps he could take to enhance

his parole prospects. The Conferees recognized that in many situations the inmate could do little, if anything, to improve his parole status. H.R.Conf.Rep. No. 94-838, supra, at 362. See page 283 supra. We interpret the passage of the Conference Report as an implicit acknowledgement that positive institutional behavior may have little impact on the parole decision.[28] See also H.R.Conf.

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[28] Plaintiffs point to a study of recidivism by Howard Bloom as evidence that a statistical predictor can include factors which change during imprisonment. (Plaintiffs' Ex. No. 54, Bloom, Evaluating Human Service and Correctional Programs by Modeling the Timing of Recidivism, 8 Soc. Methods & Research 179 (Nov. 1979). Such evidence is irrelevant. It does not matter if we think that parole prognosis should be evaluated in a different manner. The sole question here is whether the method used by the Commission comports with the dictates of the statute.

We note that Plaintiffs' Ex. Nos. 47-53, like Plaintiffs' Ex. No. 54, are a series of articles and reports, and are likewise irrelevant to the issues at bar. Regardless, these exhibits, on which we had reserved our ruling, are admitted for the purpose of possible appeal.

Rep. No. 94-838, supra, at 357-360 (analysis of §4206 does not mention rehabilitation).

2. Sentence Length

Plaintiffs complain that the guidelines are invalid because they do not provide for consideration of sentence length in the parole decision-making process. Defendants counter, and we must agree, that the statute itself makes no explicit mention of the sentence actually imposed as a factor the Commission must consider. Furthermore, we find it difficult to construe the general criteria set forth in Section 4206 to encompass sentence length. The twin conclusions that release of a prisoner would not "depreciate the seriousness of his offense or promote disrespect for the law," and would not "jeopardize the public welfare" are reached by examining "the

nature and circumstances of the offense" and "the history and characteristics of the prisoner." 18 U.S.C. §4206. Thus, the Commission must review the character of the offense, not the sentence imposed for that offense. Arguably, "the history and characteristics of the prisoner," 18 U.S.C. §42069a), could include the sentence he is currently serving. When Congress expressly itemized the information that the Commission is required to consider, however, it failed to specify sentence length. Instead, Congress included in the list "recommendations regarding parole . . by the sentencing judge." 18 U.S.C. §4207(4).

Nor can we glean from the legislative history an intention to make sentence length the starting point for the evaluation performed by the Commission. Sentence length was controlling under the House

Bill, as we have seen, but that approach was rejected by the Conference Committee. Both the Senate Report and the Conference Report speak of the release decision as one "shared" by the three branches of government. See S.Rep. No. 94-369, supra, at 336; H.R.Conf.Rep. No. 94-838, supra, at 351. Significantly, both Reports recognize that "[t]he final determination of precisely how much time an offender must serve is made by the parole authority," S.Rep. No. 94-369, supra, at 337; H.R. Conf. Rep. No. 94-838, supra, at 352. The Reports also describe the functions performed by the judicial and legislative branches in the scheme: the court sets a minimum and maximum term, within a range of discretion fixed by Congress. Id. at 337 & 352. Nowhere in either version is there an indication that the parole authority must do more than operate within the

constraints provided by the judicial and legislative branches. See Garcia v. Neagle, 660 F.2d 983, 991 (4th Cir. 1981), cert. denied, 102 S.Ct. 1023 (1982) (sentence serves to define outer limits of parole eligibility). To the contrary, the analysis of Section 4206 in the Conference Report states:

> It is the intent of the Conferees that the Parole Commission make certain judgments pursuant to this section, and that the substance of those judgments is committed to the discretion of the Commission.

H.R.Cponf.Rep. No. 94-838, supra, at 358. (emphasis added). The Conference Report then continues

> Determination of just punishment are part of the parole process, and these determinations cannot be easily made because they require an even-handed sense of justice . . . it is important for the parole process to achieve an aura of fairness by basing determinations of just punishment on comparable periods of incarceration for similar offenses committed under similar circumstances.

Id. (emphasis added). A finding that the parole decision process must use the individual sentence length as its point of embarkation would frustrate this directive.[29] Moreover, the Conference Report instructs "[t]he parole decision-makers" to "weigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment

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[29] Dr. Peter Hoffman has expressed the view that sentence length is factored into the parole decision as an indicator of unusual circumstances. He explains that,

> If you have a case where you have an unusually long [sentence] . . . you probably would examine the record to look for an aggravating factor that resulted in the imposition of what appears to be an extremely long sentence . . . then you could use that aggravating factor as a reason for going above the guidelines . . . The examiners, because they have to assess the limits of the discretion, they will be aware of the sentence length.

(Tr. at 49.) The process is the same, of course, for an unusually light sentence. (Tr. at 50.)

. . . " in reaching their determination of just punishment. Id. No mention is made of the assessment of these concepts made by the court in arriving at a sentence. It is the Commission's own judgment that is called for, because sentencing and parole are separate, although related, processes.

Our view of the interaction between sentencing and parole intended by Congress is one apparently shared by the Supreme Court. In United States v. Addonizio, 442 U.S. 178 (1979), Justice Stevens commented,

> "The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.

Id. at 189. See also Garcia v. Neagle,

660 F.2d 983, 990-91 (4th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1023 (1982); Priore v. Nelson, 626 F.2d 211 (2d Cir. 1980); Hawkins v. United States Parole Commission, 511 F.Supp. 460, 461 (E.D.Va. 1981), aff'd 679 F.2d 881 (4th Cir. 1982); Wilden v. Fields, 510 F.Supp. 1295, 1300-01 (W.D.Wis. 1981).

Thus, although we agree with other courts and commentators that the Commission might do well to give more deference to the sentence pronounced by the court, we do not think that deference is a requirement imposed by the PCRA.[30]

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[30] The Addonizio decision did not pass upon the validity of the parole guidelines. The Supreme Court considered the guidelines in the context of its ruling that a prisoner cannot attack his sentence pursuant to 28 U.S.C. §2255 on the basis that a postsentencing change in the Commission's policies frustrated the subjective intent of the sentencing judge.

Several other Supreme Court cases have analyzed the interaction between senten-

(footnote continued)

3. Accountability

Plaintiffs' next argument is the logical corollary of their attack on the ability of the Commission to disregard the sentence actually imposed. Plaintiffs contend that the guidelines constitute a system of accountability unauthorized by the PCRA. They argue that the "offense severity rating" represents the Commission's own judgment of the seriousness of the offense and how much time the offender should serve in prison, independent of the sentence set by the court and the maximum penalty designated by Congress.

(footnote continued)

cing and parole in the process of deciding other issues. The comments made in these cases have generally been in accord with the position outlined in Addonizio. See United States v. Grayson, 438 U.S. 41 (1977); Warden v. Marrero, 417 U.S. 653, 658-59 (1977); Bradley v. United States, 410 U.S. 605, 611 n.6 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

Plaintiffs' position, that Congress did not sanction such independent judgments, is contradicted by both the terms of the statute itself and the language of the Conference Report.

The statute clearly contemplates judgments regarding offense severity when it directs the Commission to determine "that release would not depreciate the seriousness of his offense or promote disrespect for the law. . ." based upon inter alia, "consideration of the nature and circumstances of the offense. . ." 18 U.S.C. §4206(a). A glance at the Conference Report, however, more vividly exposes the intention of the drafters of the PCRA to entrust the Commission with the task of assessing accountability in making its release decision. Repeatedly, the Conference Report stresses this aspect of the Commission's job:

> Nearly all men and women sent to prison as law breakers are eventually released, and the decision as to when they are released is shared by the three branches of government . . . The sentences of nearly all offenders include minimum and maximum terms, ordinarily set by the sentencing court within a range of discretion provided by statute. The final determination of precisely how much time an offender might serve is made by the parole authority . . . In the first instance, parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system. In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold the offender accountable for his own acts. . . Once sentence has been imposed, parole is the agency responsible for keeping in prison those who because of the need for accountability to society or for the protection of society must be retained in prison . . .

H.R.Conf.Rep. No. 94-838, supra, at 351-52 (emphasis added).

> It is the intent of the Conferees that the Parole Commission, in making each parole determination, shall recognize and make a determination as to the relative severity of the prospective parolee's offense, and in so doing shall be cognizant of the public perception of and respect for the law. It is the view of the

> Conferees that the U.S. Parole Commission is joined in purpose by the Courts, the Congress and other Executive agencies in a continuing effort to instill respect for the law. The Parole Commission efforts in this regard are fundamental. . Id. at 358 (emphasis added).

In the face of these expressions of legislative intent, our conclusion is obvious. The PCRA authorizes the Commission to exercise its own independent judgment in measuring the severity of an offense and the need for accountability as a result thereof.[31]

B. Constitutionality of the PCRA

Plaintiffs challenge to the constitutionality of the PCRA rests on two

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[31] A few exhibits proffered by Plaintiffs during the trial on which we withheld our ruling remain to be discussed. Plaintiffs' Ex. Nos. 63-68, which are evaluations of the reorganization of the Parole Board, are irrelevant and are not admitted. Plaintiffs' Ex.No. 71, is admitted for the purpose of appeal. Plaintiffs' Ex. Nos. 72-74, depositions of Barbara Stone-Meierhoefer, Leslie T. Wilkins, and Peter Hoffman, are admitted.

grounds, both of which rely heavily on dicta appearing in the Third Circuit's GERAGHTY opinion. First, Plaintiffs assert that a statute authorizing the Commission to focus consideration almost exclusively on deterrence and retribution, "the very factors that are available to the sentencing judge," without giving weight to the prior determination of the judicial branch, impermissibly interferes with the province of the judiciary. See, Geraghty, 579 F.2d at 261. Second, Plaintiffs argue that the PCRA violates the separation of powers doctrine by effectively delegating the legislative function of "redrafting" criminal penalties without adequate standards. Id. at 263. We will consider each of these contentions in turn.

1. Impermissible Interference with the Judiciary

The charge that the PCRA unconstitutionally authorizes the Commission to usurp the sentencing power of the judiciary has been effectively answered by the observations of the district court in Joost v. United States Parole Commission, 535 F.Supp. 71 (D.Kan. 1982). We find the reasoning of District Judge Rogers on this issue so cogent that we reproduce a portion of it here:

> At the outset, we note that there is no constitutional provision which explicitly provides or has been interpreted as providing that a judge must set or be able to predict the date of a defendant's actual release from prison whenever that might occur prior to the maximum term imposed. Congress has traditionally defined what behavior is criminal and prescribed the range of punishments to be imposed for such crimes. The sentencing court has traditionally been delegated the authority to select

from the prescribed range the most appropriate sentence on consideration of the individual defendant and circumstances. To this day, the court designates in the judgment and commitment order the maximum term an individual may be required to serve for his crime. Furthermore, by selecting one of the statutory sentencing options setting the time of parole eligibility the court effectively designates the minimum term of imprisonment. The court then commits the defendant to the custody of the Attorney General for the time of the sentence. The sentence is executed by the Attorney General and his delegates within the executive branch of government. As part of the responsibility to execute sentences, Congress has permitted executive authorities to ameliorate punishment by awarding statutory good time. Another traditional method of amelioration of punishment is executive pardon. Parole is technically nothing more nor less than another form of amelioration or mitigation of punishment authorized and defined by Congress and carried out by an executive agency. The

> PCRA, effective in March, 1976, has not substantially altered this overall scheme. We conclude that no function entrusted to the judiciary by the United States Constitution has been delegated to the United States Parole Commission.

Id. at 73-74.

Thus, the parole decision is no more within the province of the judiciary than is the assignment of an inmate to a particular institution for incarceration or to a security classification within the institution. Id. at 74. The sentencing judge may make recommendations about such matters, and under the PCRA the Commission is bound to consider his recommendation regarding parole, 18 U.S.C. §4207, but the judge has no enforceable expectation that his wishes will be followed. Id.

We endorse the Joost opinion not only because we agree with the rationale propounded therein, but also because we be-

lieve that it comports with the position espoused by the Supreme Court in its most recent pronouncements. In United States v. Addonizio, 442 U.S. 178 (1979), the Court compared the roles of the Commission and the courts:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission . . . The authority of sentencing judges to select precise release dates is, by contrast narrowly limited: the judge may select an early parole date, but that guarantees only that the defendant will be considered at that time by the Parole Commission . . . the judge has no enforceable expectation with respect to the actual release of a sentenced defendant short of his statutory term . . . the actual [release] decision is not his to make, either at the time of sentencing or later . . .

Id. at 189-90. See also United States v. Grayson, 438 U.S. 41, 47 (1977). A footnote to this passage reinforces the separation drawn by the Court between sentencing and parole in even more striking

terms. In footnote 15, Justice Stevens remarked that under 18 U.S.C. §3651 a trial judge is precluded from usurping the parole function by splitting a lengthy sentence between a stated period of probation and imprisonment. Addonizio, 442 U.S. at 190 n.15. Furthermore, the scheme outlined by the court in Addonizio is consistent with previous opinions in which the Supreme Court distinguished release decisions from parole eligibility determinations. The later is part of punishment and the sentencing function; the former is made only after sentence has been entered and prosecution has terminated. Bradley v. United States, 410 U.S. 605, 611 n.6 (1973). See also Warden v. Marrero, 417 U.S. 653, 658-59 (1974); Morissey v. Brewer, 408 U.S. 471, 480 (1972).

Based on the foregoing principles, it follows that if the authority of the judiciary is limited to selecting the outer boundaries of the time to be served, and the parole function cannot manipulate the maximum and minimum sentence in any way, the Commission does not encroach upon the judicial functions, even though it may consider the same factors in reaching a parole decision. Other courts are in accord with our conclusion that under the PCRA the Commission cannot usurp power which the judiciary does not possess. See Priore v. Nelson, 625 F.2d 211 (2d cir. 1980); Moore v. Nelson, 611 F.2d 434, 439 (2d cir. 1979); Hawkins v. United States Parole Commission, 511 F.Supp. 460, 461-62 (E.D.Va. 1982), aff'd 679 F.2d 881 (4th Cir. 1982) (relying on Addonizio); Wilden v. Fields, 510 F.Supp. 1295, 1303 (W.D. Wis. 1981) (citing Moore).

We believe that our analysis is in harmony with the current interpretation of the separation of powers doctrine. In a recent discussion on the subject, the Supreme Court identified the proper inquiry as the extent to which the challenged statute prevents a branch of government from accomplishing its constitutionally assigned functions. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). As we have previously stated, the powers delegated to the Commission cannot interfere with the power of the court to designate the actual sentence, or the date of parole eligibility.

2. Unconstitutional Delegation of Legislative Function

Plaintiffs' argument that the PCRA permits the Commission to "redraft" federal criminal penalties is misplaced. It is clear from the foregoing analysis of the

interaction between the statutory maximum, the sentence imposed, and the parole release date, that the guidelines do not perform any such function. The federal criminal statutes, on the one hand, fix the maximum penalties for the crimes they define. The guidelines, on the other hand, operate within the limits set by the statute, as well as within the confines of the sentence. Moreover, as Defendants point out, the guidelines specify time ranges for the typical length of imprisonment before parole, as opposed to maximum time periods set by statute, for various combinations of offense severity and offender characteristics. It is true that the severity ratings do not necessarily track the statutory sentence lengths, see Geraghty, 579 F.2d at 262 n.115, but there is no constitutional or statutory requirement that they do so. See Priore v. Nel-

son, 626 F.2d 211 (2d Cir. 1980); Moore v. Nelson, 611 F.2d 434, 439 (2d Cir. 1979); Wilden v. Fields, 510 F.Supp. 1295, 1302-03 (W.D.Wis. 1981). See also Section IV.A.3 supra.

In view of this conclusion, we need not reach the question of whether the standards contained in the PCRA are constitutionally adequate. Nevertheless, in our opinion the statutory criteria enunciated in 18 U.S.C. §4206 are sufficiently specific to withstand an attack on the ground that the PCRA does not provide adequate standards to guide the Commission in the exercise of its discretion. We note that the Supreme Court has broadly interpreted the power to delegate, and has declared statutes unconstitutional on this basis on only two occasions. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

V. CONCLUSION

To summarize, based on the foreoging findings of fact and our discussion thereof, we make the following conclusions of law:

First, the parole guidelines and regulations are a valid exercise of the Commission's authority under the PCRA; and Second, the PCRA does not violate the Constitution of the United States.

October 29, 1982

R. Dixon Herman
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3593

GERAGHTY, JOHN M., individually
and on behalf of a class
ADDITIONAL PLAINTIFFS:
VILLANTI, FRANK
FORD, NICOLA

vs.

UNITED STATES PAROLE COMMISSION and
ATTORNEY GENERAL OF UNITED STATES and
SUPERINTENDENT, FEDERAL PRISON CAMP,
Montgomery, Pa.
John M. Geraghty, *Appellant*

(M.D. Pa. Civil No. 76-1467)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT,
ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER and BECKER,
Circuit Judges, and RE, *Chief Judge*. *

The petition for rehearing filed by Appellant Geraghty, et al. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

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*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams would grant the petition for rehearing.

BY THE COURT,

Ruggero J. Aldisert

Circuit Judge

DATED: October 28, 1983

Statement by Judge Adams sur the denial of the petition for rehearing.

I dissent from the denial of rehearing in this case. Without addressing the merits of the panel's conclusions on the constitutionality of the Parole Commission and Reorganization Act (PCRA) as applied, I believe that the opinion, in key passages, is inconsistent with prior decisional law of this Circuit and should therefore be resolved by this Court as a whole. In particular, the interpretation of the PCRA in the opinion runs counter to the discussion in *Geraghty v. U.S. Parole Commission*, 579 F.2d 238, 259 (3d Cir. 1978). The treatment by the earlier panel of the constitutional issues raised by the Parole Commission's assumption of traditional judicial functions was left untouched by both the Supreme Court's vacatur of *Geraghty*, 445 U.S. 338 (1980), as well as by its opinion reversing this Court in *United States v. Addonizio*, 442 U.S. 178 (1979). In the latter, the Supreme Court specifically limited its discussion to the collateral habeas attack rather than to a direct constitutional

challenge, as is present here. Equally significant, the ruling in *Geraghty* was specifically reaffirmed just four months ago in *Forman v. McCall*, 709 F.2d 852 (3d Cir. 1983).

Because of the disparity between these opinions of this Court, I believe this case should be considered in banc as required by the Internal Operating Procedures, Chapter VIII C.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(TITLE OMITTED IN PRINTING)

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel August 11, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said district court, entered October 29, 1982, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:

/s/ Sally Mrvos
Clerk

October 6, 1983

STATUTES AND REGULATIONS INVOLVED

The Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, provides in pertinent part:

A. 18 U.S.C. 4203:

(a) The Commission * * * shall—

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

* * * * *

(b) The Commission * * * shall have the power to—

(1) grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole;

(3) modify or revoke an order paroling any eligible prisoner; * * *.

B. 18 U.S.C. 4205:

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

* * * * *

C. 18 U.S.C. 4206:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines

promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

* * * * *

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing * * *.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

D. 18 U.S.C. 4207:

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

E. 28 C.F.R. §2.20:

Sec. 2.20 PAROLING POLICY GUIDELINES; STATEMENT OF GENERAL POLICY.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at Sec. 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

(h)(1) The Adult Guidelines shall apply to all offenders except as specified in paragraph (2).

(2) The Youth/NARA Guidelines will apply to any offender sentenced under the Youth Corrections Act, the Narcotic Rehabilitation Act, or the Juvenile Justice Act, and to any other offender who was less than 22 years of age at the time the current offense was committed, regardless of sentence type. If an offender was less than 18 years of age at the time of the current offense, such youthfulness shall, in itself, be considered as a mitigating factor.

(i) For criminal behavior committed while in confinement see §2.36 (Rescission Guidelines).

GUIDELINES FOR DECISION-MAKING
[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981)			
	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One (formerly "low severity")	Adult Range			
	<=6 months	6-9 months	9-12 months	12-16 months
	(Youth Range)			
	(<=6) months	(6-9) months	(9-12) months	(12-16) months
Category Two (formerly "low moderate severity")	Adult Range			
	<=8 months	8-12 months	12-16 months	16-22 months
	(Youth Range)			
	(<=8) months	(8-12) months	(12-16) months	(16-20) months
Category Three (formerly "moderate severity")	Adult Range			
	10-14 months	14-18 months	18-24 months	24-32 months
	(Youth Range)			
	(8-12) months	(12-16) months	(16-20) months	(20-26) months
Category Four (formerly "high severity")	Adult Range			
	14-20 months	20-26 months	26-34 months	34-44 months
	(Youth Range)			
	(12-16) months	(16-20) months	(20-26) months	(26-32) months
Category Five (formerly "very high severity")	Adult Range			
	24-36 months	36-48 months	48-60 months	60-72 months
	(Youth Range)			
	(20-26) months	(26-32) months	(32-40) months	(40-48) months

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981)			
	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category Six [formerly 'Greatest I severity']	Adult Range			
	40-52 months	52-64 months	64-78 months	78-100 months
	(Youth Range)			
	(30-40) months	(40-50) months	(50-60) months	(60-76) months
Category Seven [formerly included in 'Greatest II severity']	Adult Range			
	52-80 months	64-92 months	78-110 months	100-148 months
	(Youth Range)			
	(40-64) months	(50-74) months	(60-86) months	(76-110) months
Category Eight* [formerly included in 'Greatest II severity']	Adult Range			
	100+ months	120+ months	150+ months	180+ months
	(Youth Range)			
	(80+) months	(100+) months	(120+) months	(150+) months

*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

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CHAPTER ONE - OFFENSES OF GENERAL APPLICABILITY

101 Conspiracy
Grade conspiracy in the same category as the underlying offense.

102 Attempt
Grade attempt in the same category as the offense attempted.

103 Aiding and Abetting
Grade aiding and abetting in the same category as the underlying offense.

104 Accessory After the Fact
Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

--- NOTE TO CHAPTER ONE
The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense).

CHAPTER TWO - OFFENSES INVOLVING THE PERSON

SUBCHAPTER A - HOMICIDE OFFENSES

201 Murder
Murder, or a forcible felony* resulting in the death of a person other than a participating offender, shall be graded as Category Eight.

202 Voluntary Manslaughter
Category Seven.

203 Involuntary Manslaughter
Category Four.

SUBCHAPTER B - ASSAULT OFFENSES

211 Assault During Commission of Another Offense
(a) If serious bodily injury* results or if 'serious bodily injury is clearly intended'*, grade as Category Seven;
(b) If bodily injury* results, or a weapon is fired by any offender, grade as Category Six;
(c) Otherwise, grade as Category Five.

212 Assault
(a) If serious bodily injury* results or if 'serious bodily injury is clearly intended'*, grade as Category Seven;
(b) If bodily injury* results or a dangerous weapon is used by any offender, grade as Category Five;
(c) Otherwise, grade as Category Two.
(d) Exception: If the victim was known to be a 'protected person'* or criminal justice official, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.

SUBCHAPTER C - KIDNAPING AND RELATED OFFENSES

221 Kidnaping
(a) If the purpose of the kidnaping is for ransom or terrorism, grade as Category Eight.
(b) If a person is held hostage in a known place for purposes of extortion (e.g., forcing a bank manager to drive to a bank to retrieve money by holding a family member hostage at home), grade as Category Seven;

*Terms marked by an asterisk are defined in Chapter Thirteen.

(c) If a victim is used as a shield or hostage in a confrontation with law enforcement authorities, grade as Category Seven;
(d) Otherwise, grade as Category Seven.
(e) Exception: If not for ransom or terrorism, and no bodily injury to victim, and limited duration (e.g., abducting the driver of a truck during a hijacking and releasing him unharmed an hour later), grade as Category Six.

222 Demand for Ransom; or Receiving, Possessing, or Disposing of Ransom Money
(a) If a kidnaping has, in fact, occurred, grade as Category Seven;
(b) Otherwise, grade as Category Five.

SUBCHAPTER D - SEXUAL OFFENSES

231 Forcible Rape or Forcible Sodomy
(a) Category Seven.
(b) Exception: If a significant prior consensual relationship is present, grade as Category Six.

232 Carnal Knowledge
(a) Category Four.
(b) Exception: If the relationship is clearly consensual, and the victim is at least 14 years old, and the age difference between victim and offender is less than four years, grade as Category One.

SUBCHAPTER E - OFFENSES INVOLVING AIRCRAFT

241 Aircraft Piracy
Category Eight.

242 Interference with a Flight Crew
(a) If the conduct or attempted conduct has potential for creating a significant safety risk to an aircraft or passengers, grade as Category Seven.
(b) Otherwise, grade as Category Two.

SUBCHAPTER F - COMMUNICATION OF THREATS

251 Communicating a Threat [to kill, assault, or kidnap]
(a) Category Four;
(b) Notes:
(1) Any overt act committed for the purposes of carrying out a threat in this subchapter may be considered as an aggravating factor.
(2) If for purposes of extortion or obstruction of justice, grade according to Chapter Three, Subchapter C, or Chapter Six, Subchapter B, as applicable.

CHAPTER THREE - OFFENSES INVOLVING PROPERTY

SUBCHAPTER A - ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

301 Property Destruction by Arson or Explosives
(a) If the conduct results in serious bodily injury* or if 'serious bodily injury is clearly intended'*, grade as Category Seven;
(b) If the conduct involves any premises where persons are present or likely to be present or a residence, building, or other structure, or results in bodily injury*, grade as Category Six;
(c) Otherwise, grade as 'property destruction other than listed above' but not less than Category Five.

302 Wrecking a Train
Category Seven.

303 Property Destruction Other Than Listed Above
(a) If the conduct results in bodily injury* or serious bodily injury*, or if 'serious bodily injury is clearly intended'*, grade as if 'assault during commission of another offense'.

*Terms marked by an asterisk are defined in Chapter Thirteen.

(b) If damage of more than $500,000 is caused, grade as Category Six;
(c) If damage of more than $100,000 but not more than $500,000 is caused, grade as Category Five;
(d) If damage of at least $20,000 but not more than $100,000 is caused, grade as Category Four;
(e) If damage of at least $2000 but less than $20,000 is caused, grade as Category Three;
(f) If damage of less than $2000 is caused, grade as Category One.
(g) Exception: If a significant interruption of a government or public utility function is caused, grade as not less than Category Three.

SUBCHAPTER B - CRIMINAL ENTRY OFFENSES

311 Burglary or Unlawful Entry
(a) If the conduct involves an armory (or facility where weapons or explosives are stored) for the purpose of theft or destruction of weapons or explosives, grade as Category Six;
(b) If the conduct involves an inhabited dwelling (whether or not a victim is present), or any premises with a hostile confrontation with a victim, grade as Category Five;
(c) If the conduct involves use of explosives or safecracking, grade as Category Five;
(d) Otherwise, grade as 'theft' offense, but not less than Category Two.
(e) Exception: If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense.

SUBCHAPTER C - ROBBERY, EXTORTION, AND BLACKMAIL

321 Robbery
(a) Category Five.
(b) Exceptions:
(1) If the grade of the applicable 'theft' offense exceeds the grade for robbery, grade as a 'theft' offense.
(2) If any offender forces a victim to accompany any offender to a different location, or if a victim is forcibly detained for a significant period, grade as Category Six.
(3) Pickpocketing (stealth-no force or fear), see Subchapter D.

322 Extortion
(a) If by threat of physical injury to person or property, or extortionate extension of credit (loansharking), grade as Category Five;
(b) If by use of official governmental position, grade according to Chapter Six, Subchapter C.
(c) Exceptions:
(1) If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense;
(2) If a victim is physically held hostage for purposes of extortion, grade according to Chapter Two, Subchapter C.

323 Blackmail [threat to injure reputation or accuse of crime]
Grade as a 'theft' offense according to the value of the property demanded, but not less than Category Three. Actual damage to reputation may be considered as an aggravating factor.

SUBCHAPTER D - THEFT AND RELATED OFFENSES

331 Theft, Forgery, Fraud, Trafficking in Stolen Property*, Interstate Transportation of Stolen Property, Receiving Stolen Property, Embezzlement, and Related Offenses
(a) If the value of the property* is more than $500,000, grade as Category Six;
(b) If the value of the property* is more than $100,000 but not more than $500,000, grade as Category Five;

*Terms marked by an asterisk are defined in Chapter Thirteen.

(c) If the value of the property* is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the value of the property* is at least $2000 but less than $20,000, grade as Category Three;
(e) If the value of the property* is less than $2000, grade as Category One.
(f) Exceptions:
(1) Offenses involving stolen checks or mail, forgery, fraud, interstate transportation of stolen or forged securities, trafficking in stolen property*, or embezzlement shall be graded as not less than Category Two;
(2) Theft of an automobile shall be graded as no less than Category Three; unless the vehicle was recovered within 72 hours with no significant damage (e.g., no damage more than $100), and there is no indication that the theft was intended for resale. In such case, grade as Category One.
(g) Note: In 'theft' offenses, the total amount of the theft committed or attempted by the offender, or others acting in concert with the offender, is to be used.

332 Pickpocketing [stealth-no force or fear]
Grade as a 'theft' offense, but not less than Category Three.

333 Fraudulent Loan Applications
Grade as a 'fraud' offense according to the amount of the loan.

334 Preparation or Possession of Fraudulent Documents
(a) If for purposes of committing another offense, grade according to the offense intended;
(b) Otherwise, grade as Category Two.

SUBCHAPTER E - COUNTERFEITING AND RELATED OFFENSES

341 Passing or Possession of Counterfeit Currency or Other Medium of Exchange*
(a) If the face value of the currency or other medium of exchange is more than $500,000, grade as Category Six;
(b) If the face value is more than $100,000 but not more than $500,000, grade as Category Five;
(c) If the face value is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the face value is at least $2000 but less than $20,000, grade as Category Three;
(e) If the face value is less than $2000, grade as Category Two.

342 Manufacture of Counterfeit Currency or Other Medium of Exchange* or Possession of Instruments for Manufacture
Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession)), but not less than Category Five. The term 'manufacture' refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

SUBCHAPTER F - BANKRUPTCY OFFENSES

351 Fraud in Bankruptcy or Concealing Property
Grade as a 'fraud' offense.

SUBCHAPTER G - VIOLATION OF SECURITIES OR INVESTMENT REGULATIONS AND ANTITRUST OFFENSES

361 Violation of Securities or Investment Regulations (8 U.S.C. 77ff,80)
(a) If for purposes of fraud, grade according to the underlying offense;
(b) Otherwise, grade as Category Two.

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*Terms marked by an asterisk are defined in Chapter Thirteen.

362 Antitrust Offenses
(a) If estimated economic impact is more than one million dollars, grade as Category Four;
(b) If the estimated economic impact is more than $100,000 but not more than one million dollars, grade as Category Three;
(c) Otherwise, grade as Category Two.

CHAPTER FOUR - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

401 Unlawfully Entering the United States as an Alien
Category Two.

402 Smuggling of Alien(s) into the United States
Category Three.

403 Offenses Involving Passports
(a) If making an unlawful passport for distribution to another, possession with intent to distribute, or distribution of an unlawful passport, grade as Category Three;
(b) If fraudulently acquiring or improperly using a passport, grade as Category Two.

404 Offenses Involving Naturalization or Citizenship Papers
(a) If forging or falsifying naturalization or citizenship papers for distribution to another, possession with intent to distribute, or distribution, grade as Category Three;
(b) If acquiring fraudulent naturalization or citizenship papers for own use or improper use of such papers, grade as Category Two;
(c) If failure to surrender canceled naturalization or citizenship certificate(s), grade as Category One.

CHAPTER FIVE - OFFENSES INVOLVING REVENUE

SUBCHAPTER A - INTERNAL REVENUE OFFENSES

501 Tax Evasion [income tax or other taxes]
(a) If the amount of tax evaded or evasion attempted is more than $500,000, grade as Category Six;
(b) If the amount of tax evaded or evasion attempted is more than $100,000 but not more than $500,000, grade as Category Five;
(c) If the amount of tax evaded or evasion attempted is at least $20,000 but not more than $100,000, grade as Category Four;
(d) If the amount of tax evaded or evasion attempted is at least $2000 but less than $20,000, grade as Category Three;
(e) If the amount of tax evaded or evasion attempted is less than $2000, grade as Category One.
(f) Notes:
(1) Grade according to the amount of tax evaded or evasion attempted, not the gross amount of income.
(2) Tax evasion refers to failure to pay applicable taxes. Grade a false claim for a tax refund (where tax has not been withheld) as a 'fraud' offense.

502 Operation of an Unregistered Still
Grade as a 'tax evasion' offense.

SUBCHAPTER B - CUSTOMS OFFENSES

511 Smuggling Goods into the United States
(a) If the conduct is for the purpose of tax evasion, grade as a 'tax evasion' offense.
(b) If the article is prohibited from entry to the country absolutely (e.g., illicit drugs or weapons), use the grading applicable to possession with intent to distribute of such articles, or the grading applicable to tax evasion, whichever is higher, but not less than Category Two;

(c) If the conduct involves breaking seals, or altering or defacing customs marks, or concealing invoices, grade according to (a) or (b), as applicable, but not less than Category Two.

512 Smuggling Goods into Foreign Countries in Violation of Foreign Law (re: 18 U.S.C. 546)
Category Two.

SUBCHAPTER C - CONTRABAND CIGARETTES

521 Trafficking in Contraband Cigarettes (re: 18 U.S.C. 2342)
Grade as a tax evasion offense.

CHAPTER SIX - OFFENSES INVOLVING GOVERNMENTAL PROCESS

SUBCHAPTER A - IMPERSONATION OF OFFICIALS

601 Impersonation of Official
(a) If for purposes of commission of another offense, grade according to the offense attempted, but not less than Category Two;
(b) Otherwise, grade as Category Two.

SUBCHAPTER B - OBSTRUCTING JUSTICE

611 Perjury
(a) If the perjured testimony concerns another offense, grade according to the underlying offense, but not less than Category Three;
(b) Otherwise, grade as Category Three.
(c) Suborning perjury, grade as perjury.

612 Unlawful False Statements Not Under Oath
Category Two.

613 Tampering With Evidence or Witness
(a) If the underlying purpose concerns another offense, grade according to the offense involved, but not less than Category Three;
(b) Otherwise, grade as Category Three.
(c) Exception: Intimidating witnesses by threat of physical harm, grade as not less than Category Five.

614 Misprision of a Felony
(a) Grade as two categories below the underlying offense, but not higher than Category Three;
(b) If the underlying offense is graded as Category Three or less, grade as Category One.

615 Harboring a Fugitive
Grade as misprision of a felony using the category of the offense for which the fugitive is wanted as the underlying offense.

616 Escape or Failure to Appear
If while in custody on another federal offense for which a severity rating can be assessed, grade the underlying offense and apply the rescission guidelines to determine an additional penalty. Otherwise, grade as Category Three.

SUBCHAPTER C - OFFICIAL CORRUPTION

621 Bribery or Extortion [use of official position - no physical threat]
(a) Grade as a 'theft offense' according to value of the bribe, demand, or the favor received (whichever is greater), but not less than Category Three.
(b) If the above conduct involves a pattern of corruption (e.g., multiple instances over a period exceeding six months), grade as not less than Category Four.

(c) If the purpose of the conduct is the obstruction of justice, grade as if 'perjury'.
(d) Notes:
(1) The grading in this subchapter applies to each party to a bribe.
(2) The extent to which the criminal conduct involves a breach of public trust, causing injury beyond that describable by monetary gain, may be considered as an aggravating factor.

622 Other Unlawful Use of Governmental Position
Category Two.

CHAPTER SEVEN - OFFENSES INVOLVING INDIVIDUAL RIGHTS

SUBCHAPTER A - OFFENSES INVOLVING CIVIL RIGHTS

701 Conspiracy Against Rights of Citizens (re: 18 U.S.C. 241)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

702 Deprivation of Rights Under Color of Law (re: 18 U.S.C. 242)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

703 Federally Protected Activity (re: 18 U.S.C. 245)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

704 Intimidation of Persons in Real Estate Transactions Based on Racial Discrimination (re: 42 U.S.C. 3631)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if 'assault'.

705 Transportation of Strikebreakers (re: 18 U.S.C. 1231)
Category Two.

SUBCHAPTER B - OFFENSES INVOLVING PRIVACY

711 Interception and Disclosure of Wire or Oral Communications (re: 18 U.S.C. 2511)
Category Two.

712 Manufacture, Distribution, Possession, and Advertising of Wire or Oral Communication Intercepting Devices (re: 18 U.S.C. 2512)
(a) Category Three.
(b) Exception: If simple possession, grade as Category Two.

713 Unauthorized Opening of Mail
Category Two.

CHAPTER EIGHT - OFFENSES INVOLVING EXPLOSIVES AND WEAPONS

SUBCHAPTER A - EXPLOSIVES OFFENSES AND OTHER DANGEROUS ARTICLES

801 Unlawful Possession of Explosives; or Use of Explosives During a Felony
Grade according to offense intended, but not less than Category Five.

802 Mailing Explosives or Other Injurious Articles with Intent to Commit a Crime
Grade according to offense intended, but not less than Category Five.

803 Improper Transportation or Marking (re: 18 U.S.C. 832, 833, 834)
(a) If resulting in death or serious bodily injury, grade as Category Four;
(b) Otherwise, grade as Category Three.

SUBCHAPTER B - FIREARMS

811 Possession by Prohibited Person (e.g., ex-felon)
Category Three.

812 Unlawful Possession or Manufacture of Sawed-off Shotgun, Machine Gun, Silencer, or 'Assassination Kit'
(a) If silencer or 'assassination kit', grade as Category Six;
(b) If sawed-off shotgun or machine gun, grade as Category Five.

813 Unlawful Distribution of Weapons or Possession with Intent to Distribute
(a) If silencer(s) or 'assassination kit(s)', grade as Category Six;
(b) If sawed-off shotgun(s) or machine gun(s), grade as Category Five;
(c) If multiple weapons (rifles, shotguns, or handguns), grade as Category Four;
(d) If single weapon (rifle, shotgun, handgun), grade as Category Three.

CHAPTER NINE - OFFENSES INVOLVING ILLICIT DRUGS

SUBCHAPTER A - HEROIN AND OPIATE* OFFENSES

901 Distribution or Possession with Intent to Distribute
(a) If extremely large scale (e.g., involving 3 kilograms or more of 100% pure heroin, or equivalent amount), and a proprietary or managerial role, grade as Category Eight;
(b) If very large scale (e.g., involving 1 kilogram but less than 3 kilograms of 100% pure heroin, or equivalent amount), and a proprietary or managerial role, grade as Category Seven;
(c) If extremely large scale [see paragraph (a)] or very large scale [see paragraph (b)], and no proprietary or managerial role, grade as Category Six;
(d) If large scale (e.g., involving 50-999 grams of 100% pure heroin, or equivalent amount), and a proprietary or managerial role, grade as Category Six;
(e) If large scale [see paragraph (c)], and no proprietary or managerial role, grade as Category Five;
(f) If medium scale (e.g., involving 5-49 grams of 100% pure heroin, or equivalent amount), grade as Category Five;
(g) If small scale (e.g., involving less than 5 grams of 100% pure heroin, or equivalent amount), grade as Category Four, except as listed under (h);
(h) If evidence of opiate dependence and very small scale (e.g., involving less than 1.0 grams of 100% pure heroin, or equivalent amount), grade as Category Three.
(i) Note: The term 'proprietary or managerial role' refers to offenders who import, manufacture, distribute, or negotiate to distribute illicit drugs or who plan, supervise, or finance such operations. Where it is established that the offender had peripheral involvement without decision-making authority (e.g., a person hired merely as a courier), grade as 'no proprietary or managerial role'.

902 Simple Possession
Category One.

SUBCHAPTER B - MARIHUANA AND HASHISH OFFENSES

911 Distribution or Possession with Intent to Distribute
(a) If extremely large scale (e.g., involving 20,000 pounds or more of marihuana/6,000 pounds or more of hashish/600 pounds or more of hash oil), and a proprietary or managerial role, grade as Category Six;
(b) If extremely large scale [see paragraph (a)], and no proprietary or managerial role, grade as Category Five;
(c) If very large scale (e.g., involving 2,000-19,999 pounds of marihuana/600-5,999 pounds of hashish/60-599 pounds of hash oil), grade as Category Five;

*Terms marked by an asterisk are defined in Chapter Thirteen.

(d) If large scale (e.g., involving 200-1,999 pounds of marihuana/60-599 pounds of hashish/ 6-59.9 pounds of hash oil), grade as Category Four;
(e) If medium scale (e.g., involving 50-199 pounds of marihuana/15-59.9 pounds of hashish/1.5-5.9 pounds of hash oil), grade as Category Three;
(f) If small scale (e.g., involving 10-49 pounds of marihuana/3-14.9 pounds of hashish/.3-1.4 pounds of hash oil), grade as Category Two;
(g) If very small scale (e.g., involving less than 10 pounds of marihuana/less than 3 pounds of hashish/less than .3 pounds of hash oil), grade as Category One.
(h) Note: The term 'proprietary or managerial role' refers to offenders who import, manufacture, distribute, or negotiate to distribute illicit drugs or who plan, supervise, or finance such operations. Where it is established that the offender had peripheral involvement without decision-making authority (e.g., a person hired merely as a courier), grade as 'no proprietary or managerial role'.

912 Simple Possession
Category One.

SUBCHAPTER C - COCAINE OFFENSES

921 Distribution or Possession with Intent to Distribute
(a) If very large scale (e.g., involving more than 1 kilogram of 100% purity, or equivalent amount), and a proprietary or managerial role, grade as Category Six;
(b) If very large scale [see paragraph (a)], and no proprietary or managerial role, grade as Category Five;
(c) If large scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount), grade as Category Five;
(d) If medium scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount), grade as Category Four;
(e) If small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount), grade as Category Three;
(f) If very small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.
(g) Note: The term 'proprietary or managerial role' refers to offenders who import, manufacture, distribute, or negotiate to distribute illicit drugs or who plan, supervise, or finance such operations. Where it is established that the offender had peripheral involvement without decision-making authority (e.g., a person hired merely as a courier), grade as 'no proprietary or managerial role'.

922 Simple Possession
Category One.

SUBCHAPTER D - OTHER ILLICIT DRUG OFFENSES*

931 Distribution or Possession with Intent to Distribute
(a) If very large scale (e.g., involving more than 200,000 doses), and a proprietary or managerial role, grade as Category Six;
(b) If very large scale [see paragraph (a)], and no proprietary or managerial role, grade as Category Five;
(c) If large scale (e.g., involving 20,000-199,999 doses), grade as Category Five;
(d) If medium scale (e.g., involving 1,000-19,999 doses), grade as Category Four;
(e) If small scale (e.g., involving 200-999 doses), grade as Category Three;
(f) If very small scale (e.g., involving less than 200 doses), grade as Category Two.
(g) Note: The term 'proprietary or managerial role' refers to offenders who import, manufacture, distribute, or negotiate to distribute illicit drugs or who plan, supervise, or finance such operations. Where it is established that the offender had peripheral involvement without decision-making authority (e.g., a person hired merely as a courier), grade as 'no proprietary or managerial role'.

*Terms marked by an asterisk are defined in Chapter Thirteen.

932 Simple Possession
Category One.

--- NOTES TO CHAPTER NINE
(1) Grade manufacture of synthetic illicit drugs as listed above, but not less than Category Five.
(2) 'Equivalent amounts' for the cocaine and opiate categories may be computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure, etc.

CHAPTER TEN - OFFENSES INVOLVING NATIONAL DEFENSE

SUBCHAPTER A - TREASON AND RELATED OFFENSES

1001 Treason
Category Eight.

1002 Rebellion or Insurrection
Category Seven.

SUBCHAPTER B - SABOTAGE AND RELATED OFFENSES

1011 Sabotage
Category Eight.

1012 Enticing Desertion
(a) In time of war or during a national defense emergency, grade as Category Four;
(b) Otherwise, grade as Category Three.

1013 Harboring or Aiding a Deserter
Category One.

SUBCHAPTER C - ESPIONAGE AND RELATED OFFENSES

1021 Espionage
Category Eight.

SUBCHAPTER D - SELECTIVE SERVICE OFFENSES

1031 Failure to Register, Report for Examination or Induction
(a) If committed during time of war or during a national defense emergency, grade as Category Four;
(b) If committed when draftees are being inducted into the armed services, grade as Category Three;
(c) Otherwise, grade as Category One.

SUBCHAPTER E - OTHER NATIONAL DEFENSE OFFENSES

1041 Offenses Involving Nuclear Energy
Unauthorized production, possession, or transfer of nuclear weapons or special nuclear material or receipt of or tampering with restricted data on nuclear weapons or special nuclear material, grade as Category Eight.

CHAPTER ELEVEN - OFFENSES INVOLVING ORGANIZED CRIME ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION, AND NON-GOVERNMENTAL BRIBERY

SUBCHAPTER A - ORGANIZED CRIME OFFENSES

1101 Racketeer Influence and Corrupt Organizations (re: 18 U.S.C. 1963)
Grade according to the underlying offense attempted, but not less than Category Five.

1102 Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise (re: 18 U.S.C. 1952)
Grade according to the underlying offense attempted, but not less than Category Three.

SUBCHAPTER B - GAMBLING OFFENSES

1111 Gambling Law Violations - Operating or Employment in an Unlawful Business (re: 18 U.S.C. 1955)
(a) If large scale operation [e.g., Sports books (estimated daily gross more than $15,000); Horse books (estimated daily gross more than $4,000); Numbers bankers (estimated daily gross more than $2,000); Dice or card games (estimated daily 'house cut' more than $1,000]; grade as Category Four;
(b) If medium scale operation [e.g., Sports books (estimated daily gross $5,000 - $15,000); Horse books (estimated daily gross $1,500 - $4,000); Numbers bankers (estimated daily gross $750 - $2,000); Dice or card games (estimated daily 'house cut' $400 - $1,000)]; grade as Category Three;
(c) If small scale operation [e.g., Sports books (estimated daily gross less than $5,000); Horse books (estimated daily gross less than $1,500); Numbers bankers (estimated daily gross less than $750); Dice or card games (estimated daily 'house cut' less than $400)]; grade as Category Two;
(d) Exception: Where it is established that the offender had no proprietary interest or managerial role, grade as Category One.

1112 Interstate Transportation of Wagering Paraphenalia (re: 18 U.S.C. 1953)
Category Three.

1113 Wire Transmission of Wagering Information (re: 18 U.S.C. 1084)
Grade as if 'operating a gambling business'.

1114 Operating or Owning a Gambling Ship (re: 18 U.S.C. 1082)
Category Three.

1115 Importing or Transporting Lottery Tickets; Mailing Lottery Tickets or Related Matter (re: 18 U.S.C. 1301, 1302)
(a) Grade as if 'operating a gambling business';
(b) Exception: If non-commercial, grade as Category One.

SUBCHAPTER C - OBSCENITY

1121 Mailing, Importing, or Transporting Obscene Matter
(a) If for commercial purposes, grade as Category Three;
(b) Otherwise, Category One.

1122 Broadcasting Obscene Language
Category One.

SUBCHAPTER D - SEXUAL EXPLOITATION OF CHILDREN

1131 Sexual Exploitation of Children (re: 18 U.S.C. 2251, 2252)
Category Six.

SUBCHAPTER E - PROSTITUTION AND WHITE SLAVE TRAFFIC

1141 Interstate Transportation for Commercial Purposes
(a) If physical coercion, or involving person(s) of age less than 16, grade as Category Six;
(b) If involving persons(s) of ages 16-17, grade as Category Five;
(c) Otherwise, grade as Category Four.

1142 Prostitution
Category One.

SALIENT FACTOR SCORE (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE)..... ☐

None ..... = 3
One ..... = 2
Two or three ... = 1
Four or more ... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE).. ☐

None ..... = 2
One or two ..... = 1
Three or more .. = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS..... ☐

Age at commencement of the current offense:
26 years of age or more ..... = 2 ***
20-25 years of age ..... = 1 ***
19 years of age or less ..... = 0

***EXCEPTION: If five or more prior commitments of more than thirty days (adult or juvenile), place an "x" here _____ and score this item ..... = 0.

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS)..... ☐

No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense..... = 1

Otherwise ..... = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME..... ☐

Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time..... = 1

Otherwise ..... = 0

Item F: HEROIN/OPIATE DEPENDENCE..... ☐

No history of heroin/opiate dependence ..... = 1

Otherwise ..... = 0

TOTAL SCORE..... ☐

NOTE: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as as conviction, even if a conviction is not formally entered.